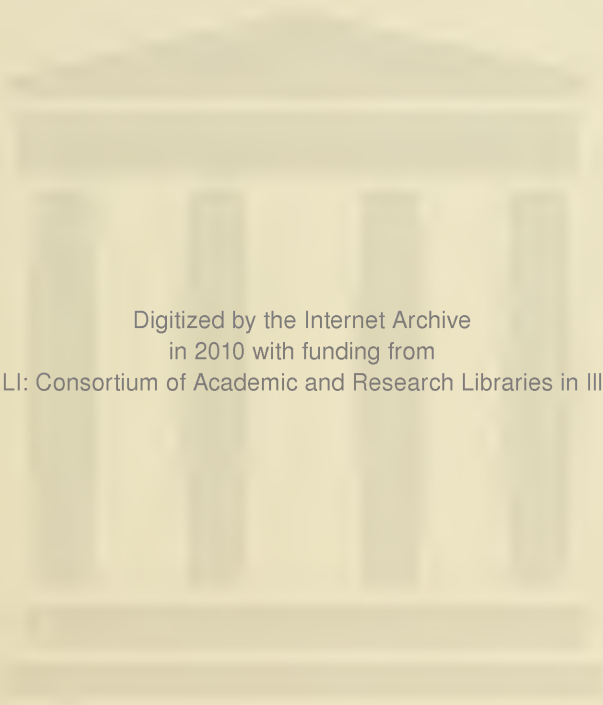
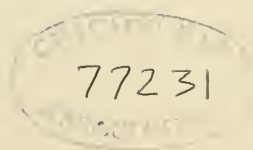


CHICAGO BAR
77231
JANUARY 1900



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NOV 8 '60

35312

GAGE BERNARD WALLIREN,
a minor, by Delema Meyer,
his next friend,
Defendant in error,

v.

JOSEPH G. WEBER,
Plaintiff in Error.

217
8/50
14
ERROR TO SUPERIOR

COURT, COOK COUNTY.

265 I.A. 597'

MR. PRESIDING JUSTICE GRIBLEY DELIVERED THE OPINION OF THE COURT.

In an action for damages for personal injuries received by plaintiff in an automobile accident on August 30, 1928, there was an ex parte trial before the court (Judge McKinley) without a jury on January 28, 1931, resulting in a finding and judgment against defendant for \$8,000, the full amount of plaintiff's claim. On March 24, 1931, after two terms of court had passed, defendant appeared and, under section 89 of the Practice Act, moved that the judgment be vacated and that a trial be had upon the merits. The motion was supported by a petition. Subsequently defendant filed an amended petition, supported by an affidavit of his attorney, and by leave of court he filed an amendment to the petition. On April 3, 1931, there was a hearing upon the petition, as amended, and plaintiff's answer thereto. During the hearing defendant's attorney gave testimony which was in substantial accord with his affidavit. The court entered an order denying the prayer of the petition to vacate the judgment, and, to reverse the order defendant prosecutes the present writ of error. Plaintiff has not appeared in this court or filed any brief.

Plaintiff's declaration consists of three counts. In the first it is alleged in substance that on August 30, 1928, plaintiff, a minor under seven years of age, was "walking westward

NOV 1932



WILLIAM H. HARRIS
JAMES H. HARRIS

THE HARRIS WILLIAMS
FIRM, BY JAMES HARRIS,
ATTORNEY AT LAW,
ST. LOUIS, MISSOURI

JOHN W. HARRIS
PERSONAL IN ATTORNEY

Set 1. A. 1932

WHEREAS the undersigned is the owner of the above

in the year 1932 for personal injuries sustained
by himself in an automobile accident on March 20, 1932, there
was a settlement between the parties (James H. Harris) witness a
check January 22, 1932, received in a check and payment
made therefor for \$2,000.00, the full amount of plaintiff's claim
on the 22nd day of March 1932, and that the parties, defendant
and, under section 87 of the Statutes of Missouri, have that the
claim is settled and that a trial be had upon the merits. The
settlement was made by a written instrument, substantially following the
attached petition, supported by an affidavit of his attorney, and
it is of record in the office of the clerk of the court. On April
1, 1932, there was a hearing upon the petition, as amended, and
plaintiff's answer thereto. After the hearing defendant's attorney
testimony which was in substantial accord with his affidavit.
The court entered an order denying the prayer of the petition to
rescind judgment, and to restore the under defendant's possession
thereof with costs. Plaintiff has not appeared in this court
on many times.

Plaintiff's declaration consists of three counts. In
that it is alleged in substance that on March 20, 1932,

plaintiff, a minor child seven years of age, was injured

across Milwaukee avenue," a northwesterly and southeasterly public street in Chicago; that defendant was "driving his automobile in a westerly direction on Diversey avenue and turning south in Milwaukee avenue," and so negligently operated his automobile that it struck plaintiff, knocked him down and ran over him, and seriously and permanently injured him. In the second count the charge is willful and wanton negligence. In the third the charge is that defendant violated a statute of Illinois in that he negligently failed to give reasonable warning of the automobile's approach and to use every reasonable precaution to avoid injuring plaintiff, and negligently failed to stop the automobile until plaintiff could safely proceed. In apt time defendant entered an appearance by his attorney, Ernest Kentwortz, and filed a plea of the general issue.

In defendant's petition, as amended, he alleged in substance that on March 19, 1931, he was served with an execution issued upon the judgment entered against him on January 28, 1931; that this was the first intimation or knowledge he had that there had been a trial of the case, and that he immediately conferred with his attorney; that prior to said trial he and his attorney had made preparations for his defense and had interviewed witnesses, etc.; that he had no knowledge that the case had been put upon the trial call of any judge of the court; that the reason he did not appear when the cause was called for trial is that he was not notified by his attorney; that his attorney was watching the case, and that the reasons said attorney did not notify him of the impending trial, and was himself not present when the case was called, is as stated in said attorney's affidavit hereto attached and made a part of this petition; that he has a good defense upon the merits to plaintiff's claim; that he was not guilty of any negligence on the day of the accident; that he was driving his automobile easterly on Diversey

avenue and came to a complete stop just west of Milwaukee avenue and waited for the traffic lights to change; that when they changed, indicating that he might advance, he slowly made a right turn southerly into Milwaukee avenue and continued going southerly in that avenue at a speed not exceeding 8 miles an hour; that there was a line of cars parked on the east side of that avenue and other cars moving in a procession northerly in that avenue, while he, to the west of them, was moving southerly; that suddenly and when he was more than 100 feet south of Diversey street, a child (plaintiff) "darted out into the street," between two of the cars moving in said procession, "and in front of petitioner's car, as a result of which it struck said child;" and that the movements of the child were "a quick and complete surprise" to him, and although he applied the brakes to the car which were in good condition, he was unable to stop the car in time to avoid hitting the child, etc.

In the affidavit of said attorney, Ernest Kentwartz, he alleged in substance that he did not know that, when the case was called for trial in January, 1931, it was or had appeared on the trial call of any judge of the court; that he first learned of this fact and of the entry of the ex parte judgment when his client brought the issued execution to him on March 19, 1931; that for several months prior to said trial he was of the belief that the case had been assigned to Calendar No. 11 of the court; that he diligently watched in the Law Bulletin the progress of the cases upon that calendar, which Judge S. Murray Clark was calling; that the number of said case on said calendar was 187 and that prior to January 28, 1931, he had noticed that said judge in calling cases on the same had not progressed beyond case No. 150; that shortly prior to November 1, 1930, "supplemental Calendar No. 2" was issued; that he had difficulty in finding said case on any of the eleven

evidence and came to a stoppage when they were at Williams Avenue
 and waited for the traffic lights to change; that when they started,
 indicating that he might observe, he slowly made a right turn
 northward into Williams Avenue and continued until he reached the
 Avenue at a spot not exceeding 2 miles or more; that there was a
 line of cars parked on the east side of that Avenue and other cars
 moving in a procession northward in that Avenue, while he, in the
 west of them, was moving southward; that he only saw when he was
 more than 100 feet south of Riverside Drive, a child (girl?)
 "darted out into the street," between two of the cars moving in said
 procession, "and in front of petitioner's car, as a result of which
 it struck said child," and that the movements of the child were "a
 quick and complete surprise" to him, and likewise he applied the
 brakes to the car which were in good condition, he was unable to
 stop the car in time to avoid hitting the child, etc.
 In the affidavit of said attorney, Ernest B. Schwartz,
 he alleged in substance that he did not know that, when the case
 was called for trial in January, 1931, it was not and appeared on
 the trial roll of any Judge at the court; that he first learned
 of this fact one of the entry of the ex parte judgment when his
 client brought the second motion to him on March 12, 1931; that
 for several months prior to said trial he was of the belief that
 the case had been assigned to Colonel No. 11 of the court; that
 he diligently watched in the law Bulletin the progress of the case
 upon that calendar, which Judge E. Murray Clark was calling; that
 the number of said case on said calendar was 137 and that prior to
 January 22, 1931, he had noticed that said Judge in calling cases
 on the calendar had not progressed beyond case No. 120; that shortly
 prior to November 2, 1931, "unpublished Calendar No. 2" was issued;
 that he had diligently in looking said case on any of the eleven

different judges' calendars contained in said "Supplemental Calendar;" that upon calling upon one of the deputy clerks of said court, shortly after said "supplemental Calendar" was issued, said clerk showed to him that the case appeared as No. 187 on the "Non-Jury Calendar," for the calling of which no judge had as yet been assigned, and the clerk told him "to watch Calendar No. 11;" and that the first page or cover of said "supplemental calendar" is as follows:

A copy of said cover is here set out in the affidavit. It discloses that there are eleven trial calendars to be called by different judges. Ten of these trial calendars are numbered from 1 to 10 inclusive and underneath each number appears the name of the particular trial judge. Then follows "No. 11" and immediately underneath are the words "To Be Assigned." Then follow the words:

"This calendar (meaning said No. 11) contains the following cases:

Calendar No.	105 to 145 inclusive,	from Calendar No. 1
"	" 86 to 128	" " " No. 5
"	" 121 to 140	" " " No. 9
"	" 126 to 145	" " " No. 10
	and	
	Non-Jury Calendar"	

And in the affidavit affiant further alleged that "from the manner in which the calendars of the various judges are listed on said cover it appeared to this affiant, and evidently to said deputy clerk, that the 'non-jury calendar' was a part of Calendar No. 11, and was not an independent calendar" (as above the words "Non-Jury Calendar" no number appeared); that from the typographical layout of the cover affiant was of the opinion that said "non-jury calendar" was merely one of the integral parts of Calendar No. 11 and that some judge would thereafter be assigned to hear the cases on said calendar No. 11, including those on said "non-jury calendar;" that thereafter said Judge S. Murray Clark was assigned to hear the

cases on Calendar No. 11, and affiant watched the progress of said calendar; that by reason of said typographical arrangement of the cover, as well as the statement of the clerk of the court as aforesaid, affiant was "misled" into the belief that said case would in due time be called by said Judge Clark and not by any other judge; and that in acting upon said belief he acted "reasonably and without negligence."

In plaintiff's answer to the petition it is alleged that after the case was at issue, no jury having been demanded, it was, pursuant to a court order and notice in due form served upon defendant's attorney, placed upon the calendar of non-jury cases; that afterwards it was called in its order upon the daily call of the judge to whom the trial of non-jury cases had been assigned for several days prior to the date of said ex parte hearing; that at no time did defendant or his attorney appear in court to make a defense; that "none of the excuses offered by defendant as reasons for vacating said judgment is sufficient in law or in fact;" that the designation of cases upon the cover of said supplemental calendar "is not such as to be a legal excuse for the inattention to the call of the trial calendar;" that the facts and things alleged in the petition "do not bring the same within the purview of a motion in the nature of a writ of error coram nobis, in this, that said errors are not errors of fact;" and that said matters and things as so alleged "are confessions of negligence on the part of both defendant and his attorney." It will be noticed that the answer is more in the nature of a special demurrer to defendant's petition than it is an answer thereto.

On the hearing on the motion, as above stated, defendant's attorney gave testimony which was in substantial accord with his said affidavit, but no evidence whatever was introduced by plaintiff contradicting the facts as stated in said attorney's

cases on October 22, 11, and 12, and which showed the presence of said defendant and of counsel at said proceedings. At the close of the case, he said at the statement of the court of law that he thought, without any doubt, that the defendant had been present in the time he called of said case. He said that he was not by any other judge and that in looking upon said case he was "completely and without negligence."

In plaintiff's answer to the petition it is alleged that after the case was at issue, he duly having been summoned, is was presented to a court order and called in the court room before the judge, and placed upon the stand of the witness; that afterwards it was called in the court room the call of the judge to whom the trial of the case was then assigned for several days prior to the date of said hearing; that at the time the defendant or his attorney appeared in court to make a defense that "none of the evidence offered by defendant was relevant for anything said judgment is sufficient in law or in fact;" that the defendant of cases upon the cover of said judgment called "is not known as to be a legal error for the defendant to the call of the trial calendar;" that the facts and things alleged in the petition "do not bring the case within the provision of a motion in the nature of a writ of habeas corpus in this, that said errors are not errors of fact;" and that said errors are things as so alleged "are not" reasons of negligence on the part of both defendants and his attorney." It is also stated that the answer is not in the nature of a special demurrer to defendant's petition since it is an answer thereto.

On the hearing on the motion, as above stated, plaintiff's attorney gave testimony which was in substantial accord with his own affidavit, but no evidence whatever was introduced by plaintiff contesting the facts as stated in said attorney's

affidavit and testimony.

After considering the petition and affidavit, the answer of plaintiff thereto and the testimony adduced, we are of the opinion that the court erred in denying the prayer of the petition, and in refusing to vacate said judgment of January 28, 1931. While it has been decided in Cramer v. Commercial Men's Ass'n, 260 Ill. 516, 521, and many subsequent cases, that the motion under section 89 of the Practice Act "is not intended to relieve a party from the consequences of his own negligence," it is said in Jacobson v. Ashkinaze, 337 Ill. 141, 146, (italics ours): "The purpose of the writ coram nobis at common law, and of the statutory motion substituted for it in this State, is to bring before the court rendering the judgment matters of fact not appearing of record, which, if known, at the time the judgment was rendered, would have prevented its rendition. Illustrations of such matters are the disability of the parties to sue or defend, the failure of the clerk to file a plea or answer, and the omission to interpose, through fraud, duress or excusable mistake and without negligence on the part of the defendant, a valid defense existing in the facts in the case." We think that in the present case it sufficiently appears that it was owing to an "excusable mistake," and not negligence, on the part of defendant's attorney that neither he nor defendant was present in court to defend the case when it was called for trial on the non-jury calendar before Judge McKinley. And we think that said mistake was brought about by the typographical arrangement of the cover of supplemental calendar No. 2, (printed and distributed by the clerk of the court) and the statements thereon, coupled with the verbal statement of a deputy clerk of the court, made to defendant's attorney as shown and upon which the latter apparently relied. (See Toth v. Samuel Phillipson & Co., 250 Ill. App. 247, 251-2; Madden v. City of Chicago, 283 Ill. 165,

169-70; McGrath & Swanson Co. v. Chicago Railways Co., 252 Ill. App. 476, 481-2.

Accordingly, the order of the superior court of April 3, 1931, denying the prayer of defendant's petition and refusing to vacate said judgment of January 28, 1931, is reversed and the cause is remanded with directions to vacate said judgment.

REVERSED AND REMANDED WITH DIRECTIONS.

Kerner, J., concurs;

Scanlon, J.: I concur in the judgment of this court but not in all that is said in the opinion.

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184-701; 184-701 is covered by V. 1.

35328

SAMUEL SOLOMON,
Defendant in Error,

v.

NORTH AMERICAN TRUST CO.,
(formerly known as Iroquois
Trust Co.) and HARRISON
PARKER and JOHN C. GREY,
Plaintiffs in Error.

227
ERROR TO MUNICIPAL
COURT OF CHICAGO.

265 I.A. 597²

MR. PRESIDING JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

On March 2, 1931, plaintiff commenced in the municipal court a 4th class action in tort against defendants, who, having been served with process and not having appeared, were duly defaulted. On April 29, 1931, on the ex parte hearing of evidence without a jury, the court found defendants guilty in manner and form as charged in plaintiff's statement of claim and assessed plaintiff's damages "at the sum of \$305 in tort," and entered judgment on the finding against defendants in that sum. The present writ of error is sued out to reverse the judgment.

Defendants' sole contention is that plaintiff's statement of claim is insufficient to support the judgment. The statement of claim is in substance as follows:

That on or about January 3, 1928, defendants represented to plaintiff that a certain company, to be known as the "Iroquois National Bank of New York City," was in process of organization, and that said proposed bank "had complied with all of the Federal laws and statutes of the United States in the formation of a national bank;" that relying upon said representations plaintiff subscribed to "one unit of shares" of said proposed bank and paid to defendants the sum of \$260 on January 3, 1928, and the sum of \$45 on February 3, 1928.

That on January 3, 1928, defendants also represented to plaintiff that said proposed bank "had qualified in the office of the Comptroller of the Currency of the United States by the filing of Articles of Association and organization certificate, pursuant to sections 5133, 5134 and 5135 of the National Bank Act of the United States, and was acting pursuant to powers conferred by section 5136 of said bank act."

2022

AMERICAN NATIONAL BANK
NEW YORK, N.Y.

7.

NEW YORK, N.Y., MAY 15, 1934.
(Formerly known as American
Trust Co., and American
Trust and Savings Bank,
incorporated in New York.)

AMERICAN NATIONAL BANK
NEW YORK, N.Y.

2022 I.A. 202

RE: AMERICAN NATIONAL BANK, Plaintiff, vs. THE UNITED STATES, Defendant.

On March 22, 1934, Plaintiff commenced in the Southern District of New York a civil action in that certain defendant, who, having

been served with process and not having appeared, were duly de-

faulted. On April 18, 1934, on the expiration of the time

without a jury, the court found defendant guilty in certain law

terms as set forth in Plaintiff's statement of claim and entered

Plaintiff's demand for the sum of \$100,000.00, and entered

judgment on the finding against defendant in that sum. The

present writ of error is now and to reverse the judgment.

Defendant's sole contention is that Plaintiff's state-

ment of claim is insufficient to support the judgment. The

statement of claim is in substance as follows:

That on or about January 2, 1934, defendant represented

to Plaintiff that a certain sum of money, to be known as the "Investment

Account" and that said sum of money was deposited with all of the Federal

Reserve Bank of the United States in the possession of a

certain person, and that said sum of money was deposited with and paid

to defendant the sum of \$100,000.00, and the sum of

\$100,000.00 on February 1, 1934.

That on January 2, 1934, defendant also represented to

Plaintiff that said person was and was to be in the office of

That plaintiff relied upon the truth of the representations aforesaid made by defendants and "paid over said total sum of \$305 on the respective dates mentioned to the Iroquois Trust Company;" that "said Iroquois National Bank of New York City was in fact never duly qualified in the office of said Comptroller of the Currency under the sections aforementioned;" and that "said information did not come to the plaintiff until after he was induced by defendants to part with the sums aforesaid."

That plaintiff has made repeated demands upon defendants and each of them for the return of said sums totalling \$305, but that they and each of them have refused to return said total sum to plaintiff, "and have maliciously, fraudulently and wantonly converted said sum to their own use;" to plaintiff's damage, etc.

We are of the opinion that the statement of claim is sufficient to support the tort judgment in question on the theory that the action is one for damages for fraud and deceit in inducing plaintiff to part with \$305 of his money by the false representations of defendants, relied upon by plaintiff, that the said Iroquois National Bank was in process of organization and had qualified under the mentioned sections of the National Bank Act, when as a matter of fact it had never so qualified, or upon the theory of an unlawful conversion of plaintiff's money. While it might be contended that upon either theory the allegations in the statement of claim would be insufficient if contained in a declaration in an action in the circuit court, still this is not such an action but is one of the 4th class in the municipal court, in which "the issues shall be determined without other forms of written pleadings than those hereinafter expressly prescribed or provided for" (Section 3 Municipal Court Act, Cahill's Stat. 1929, Chap. 37, p. 865), and in which the statement of claim, "if the suit be for a tort, shall consist of a brief statement of the nature of the tort and such further information as will reasonably inform the defendant of the nature of the case he is called upon to defend, but nothing herein contained shall be construed to require the statement of claim in any action for a tort to set forth the cause of action with the particularity required in a declaration at common law." (Sec. 40, Cahill's Stat. 1929, pp. 875-

6.) We think that the statement of claim sufficiently complied with the requirements of the statute. By it defendants were reasonably informed of the nature of the case they were called upon to defend. (See Johnston v. Shockey, 335 Ill. 363, 366-7; Sher v. Robinson, 298 Ill. 131, 134; Edgerton v. Chicago, etc. Ry. Co., 240 Ill. 311, 312.)

The judgment should be affirmed and it is so ordered.

AFFIRMED.

Kerner and Scanlan, JJ., concur.

(c) It shall be the duty of the Board of Directors to cause to be prepared and filed with the Secretary of the State a statement of the assets and liabilities of the corporation as of the close of each fiscal year. Such statement shall be in the form prescribed by the Board of Directors and shall be signed by the President and the Secretary of the corporation. The statement shall be filed with the Secretary of the State within thirty days after the close of each fiscal year.

ARTICLE IV. OFFICERS AND DIRECTORS.

35379

LESLIE P. COLEMAN,
Appellee,

v.

HERMAN HEUSER,
Appellant.

APPEAL FROM SUPERIOR COURT,

COOK COUNTY.

265 I.A. 597³

MR. PRESIDING JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

In an action in assumpsit to recover commissions as a real estate broker there was a trial before a jury in April, 1931, resulting in a verdict in plaintiff's favor for \$8,750. Subsequently the court entered judgment upon the verdict against defendant and he appealed.

The action was commenced on May 3, 1929. Plaintiff's declaration consisted of a special count and the common counts. Defendant filed a plea of the general issue and a special plea that plaintiff "never had exclusive authority to sell the property, and what authority he did have was revoked on, to-wit, October 8, 1924."

In the special count plaintiff alleged in substance that on April 3, 1924, he was, and ever since has been, a licensed real estate broker in Chicago; that defendant was the owner of a large farm property (describing it) in the Township of Dundee, Kane County, Illinois; that on said day, at Chicago, defendant employed him to procure a purchaser for the property at the price of \$200,000, and promised to pay to him the customary rate of commission for his services in procuring a purchaser; that the customary rate of commission, well known to defendant, was 5 per cent of the price at which the property was sold; that thereafter, and after accepting said employment, plaintiff "used all due diligence" to find a purchaser, and to that end listed the property upon his books and "spent much time,

23870

WILLIAM S. WILSON,
Plaintiff,

v.

WILLIAM S. WILSON,
Defendant.

WILLIAM S. WILSON, Plaintiff,

v.

WILLIAM S. WILSON,
Defendant.

WILLIAM S. WILSON, Plaintiff, vs. WILLIAM S. WILSON, Defendant.

In an action to recover possession of a

real estate, the plaintiff claims a title to the property, and

alleges that the defendant is in possession of the property, and

that the defendant is in possession of the property, and

he alleges.

The action was commenced on May 24, 1907. The plaintiff's

declaration consisted of a special count and the common count.

The defendant filed a plea of the general issue and a special plea and

alleged that the plaintiff was in possession of the property, and

that the plaintiff was in possession of the property, and

in the special count alleged in substance that

on April 2, 1907, the plaintiff was in possession of the property, and

that the plaintiff was in possession of the property, and

that the plaintiff was in possession of the property, and

that the plaintiff was in possession of the property, and

that the plaintiff was in possession of the property, and

that the plaintiff was in possession of the property, and

that the plaintiff was in possession of the property, and

that the plaintiff was in possession of the property, and

that the plaintiff was in possession of the property, and

that the plaintiff was in possession of the property, and

labor and money;" that "among his customers and correspondents" was the "Brotherhood of American Yeomen," a corporation (hereinafter called the Brotherhood), which was ready, able and willing to buy the property at the price fixed; that plaintiff took representatives of the Brotherhood to view the property; that defendant did not know them and did not know that the Brotherhood was a prospective purchaser; that the Brotherhood purchased the property on July 3, 1925 for the sum of \$200,000; that such sale "was the result of plaintiff's efforts;" that defendant, "with the intent and purpose of avoiding payment of any commission" did not make the sale direct to the Brotherhood, but did on July 3, 1925 convey the property by warranty deed to one J. H. Bacon, who on the same day in turn conveyed it to the Brotherhood; and that because of the foregoing defendant is indebted to the plaintiff in the sum of \$10,000, etc.

On the trial plaintiff was a witness in his own behalf and his only other witness was his attorney, Anson M. Brown, who tried the case. For defendant, Raymond S. Heuser, his son, testified, as did also Augustus W. Farmer, secretary of the "Children's Home Committee" of the Brotherhood, Mark T. McKee, one of its Board of Directors of which W. R. Shirley was the executive chairman, and Henry W. Meyers, State Manager of the Brotherhood for Illinois. Certain correspondence and other writings were introduced.

After considering all of the evidence we are of the opinion that plaintiff did not sufficiently show that he was the procuring cause of the sale of the property to the Brotherhood, which was consummated about July 3, 1925, by conveyances from defendant to said Bacon, a representative of the Brotherhood, and by Bacon to it. Although it appears that plaintiff presented the property to Farmer in April or May, 1924, and had negotiations with him and other

labor and money," that "many his countrymen and foreign-born
 was the "system of an industrial revolution," a revolution (industrial)
 after called the "revolution," which was money, and was willing

to buy the property of the police forces that plaintiff took

the assistance of the defendant to give the property back

defendant did not know that and did not know that the defendant

was a proprietor; plaintiff that the defendant purchased the

property in July 1, 1915 for the sum of \$10,000; that there was

"was the result of plaintiff's witness," that defendant, "with the

intent and purpose of avoiding payment of any commission" did not

make the sale direct to the defendant, but did on July 1, 1915

convey the property by warranty deed to one J. K. Brown, who on the

same day in turn conveyed it to the defendant; and that because

of the foregoing defendant is indebted to the plaintiff in the sum

of \$10,000, etc.

On the trial plaintiff was a witness in his own behalf

and his only other witness was his attorney, James H. Brown, who

tried the case. For defendant, Lawrence H. Brown, his son, testified.

He did also introduce H. Brown, secretary of the "Chicago's Home

Committee" of the defendant, Mark T. Brown, one of the Board of

Directors of which H. Brown was the Executive Director, and Henry

H. Brown, State Manager of the defendant for Illinois, Chicago.

Correspondence and other exhibits were introduced.

After considering all of the evidence we are of the opinion

that plaintiff did not establish that he was the proprietor

owner of the sale of the property to the defendant, which was the

summed about July 1, 1915, by defendant from defendant to said

Brown, a representative of the defendant, and by Brown to it.

Although it appears that plaintiff presented the property to Brown

in April or May, 1914, and had negotiations with him and others

representatives of the Brotherhood during May and June, 1924, looking to a sale of the property at \$200,000, it also appears in substance that the Brotherhood by Shirley refused to purchase the property at that price; that defendant at plaintiff's solicitation refused to consider selling it for \$150,000 cash; that after July 1, 1924, plaintiff ceased active negotiations to bring about a sale to the Brotherhood at any price; that plaintiff's authority to negotiate a sale was not exclusive; that as early as October 8, 1924, defendant wrote to plaintiff that he did not want him to sell "my farm, known as the Good Luck Farm;" and that the subsequent sale of the property to the Brotherhood for \$175,000, about 9 months later, was brought about by negotiations in which plaintiff did not have a part. And we fail to find any competent evidence in the record tending to show any fraudulent actions or attempts, either on defendant's part or that of representatives of the Brotherhood, to deprive plaintiff of commissions.

And we think that the jury's verdict of \$8,750 (which is 5 per cent of \$175,000, the price defendant received from the sale) was improperly influenced by plaintiff's letter to defendant dated June 13, 1925, a copy of which the court, over the objection of defendant that it was a self-serving instrument, etc., allowed in evidence. It is in part as follows:

"Upon reviewing our conversation of yesterday at your office in Chicago, I feel that I should warn you not to pay these mysterious brokers the commission for selling your Good Luck farm to my customers, the Brotherhood of American Yeomen. You told me that it was not the Yeomen who were purchasing this from you, but some mysterious party with a nameless broker. Now these people are in reality my customers, - the Yeomen merely coming in the back door. You should not allow them to do that as you are the one to suffer, as you are liable to pay the double commission on the sale of the farm.

I write you this for your own good. Our past associations have been very pleasant and I hope that you will consider well before you let anything disturb our friendship. * * If you will just hold on a bit, you will only have to pay one commission, so please do not be hasty and let these fellows sign you up on this unmerited commission.

representative of the defendant during the year 1934, looking to a sale of the property at \$200,000. It is also stated in evidence that the defendant by letter advised to purchase the property at that price; that defendant at plaintiff's suggestion refused to consider selling it for \$150,000 until after July 1, 1934. Plaintiff caused another negotiation to bring about a sale to the defendant at any price that plaintiff's authority to negotiate a sale was not exclusive; that as early as October 7, 1934, defendant wrote to plaintiff that he did not want him to sell "any farm, known as the Good Luck Farm" and that the defendant sold of the property to the defendant for \$150,000, about 8 months later, was brought about by negotiation in which plaintiff did not have a part. It is also said to find any relevant evidence in the record tending to show any fraudulent action or design, either on defendant's part or that of representatives of the defendant, to deprive plaintiff of commissions.

And we think that the jury's verdict of \$3,750 (which is 5 per cent of \$75,000), the price defendant received from the sale) was properly influenced by plaintiff's letter to defendant dated June 22, 1934, a copy of which the court, over the objection of defendant said it was a self-serving instrument, etc., allowed in evidence. It is in part as follows:

"When reviewing our conversation of yesterday at your office in Chicago, I find that I should wish you not to pay these mysterious persons the commission for selling your Good Luck Farm to my customer, the Brotherhood of American Women. You told me that it was not the woman who was purchasing this farm, but some mysterious party with a mysterious broker. You then pointed me in reality up at someone - the woman merely acting in the background. You should not allow them to do that as you are the one to suffer, as you are liable to pay the entire commission on the sale of the farm.

I wish you this but your own good. Our past negotiations have been very pleasant and I hope that you will continue well before you let anything disturb our friendship. * * * If you still have a bit on a bit, you will only have to pay one commission, so please do not be heavy and let these fellows sign you up on this unethical commission."

* * You accepted my services in our endeavor to sell this property to the Yeomen last year, as your correspondence shows. I cannot help it if they are slow in reaching a decision. * * All I could do was to put the proposition up to them for their consideration and let them decide. I furnished them pictures, blue prints, and met their head man, Mr. Farmer, in Chicago on May 14th (1924), by appointment, and put your property up to him in person. Of course the deal dragged, but that was unavoidable.

Why an organization like the Yeomen should doublecross me I don't know, but that does not lessen your liability in the least. These are my people; I claim to have first submitted this property to them; and I shall surely claim the just commission due me. At least, please hold the commission until you see who it really belongs to. This is a favor to yourself."

We think that the court committed error, prejudicial to defendant, in admitting this letter in evidence. It is merely a self-serving instrument and upon its face discloses an attempt on plaintiff's part to bolster up, if possible, his claim for commissions, to enforce which claim he then had in mind the bringing of a suit against defendant. (See, Graham v. Rizzner, 28 Ill. App. 269, 275; Cook v. American Luxfer Prism Co., 93 id. 299, 301; U. S. Health & Accident Ins. Co. v. Harvey, 129 id. 104, 108; Hovey v. Matteson, 133 id. 486, 489.)

For the reasons indicated the judgment of the superior court is reversed and the cause remanded.

REVERSED AND REMANDED.

Kerner and Scanlan, JJ., concur.

... ..

35403

PATRICK J. O'KEEFE,
Appellee,

v.

ABRAHAM COHEN,
Appellant.

24 A
APPEAL FROM SUPERIOR COURT,
COOK COUNTY.

265 I.A. 597⁴

MR. PRESIDING JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

On July 14, 1931, following the verdict of a jury in an action in assumpsit to recover moneys for claimed attorney's fees, plaintiff obtained a judgment against defendant in the sum of \$4,000, and this appeal followed. On November 24, 1931, after the appeal had here been perfected, defendant's death on September 14, 1931, was suggested of record, and it was ordered that Sophie Cohen and Ida M. Brown, executrices of his last will, be substituted as appellants.

Plaintiff's action was commenced on March 4, 1930. In his declaration, consisting of one special count, he alleged in substance that on or about December 7, 1927, he was a duly licensed attorney-at-law, practicing his profession in Chicago; that defendant was a large stockholder and officer of the McLaren Consolidated Cone Co., a corporation (hereinafter called the company), which then was indebted to him for back salary as such officer; that there had been controversies between defendant and other officers of the company as to its affairs and the conduct of its business; that on said day, at Chicago, defendant employed plaintiff as an attorney to represent him in said controversies and conditions then existing, and plaintiff accepted the employment and then and there undertook to represent defendant "in said controversies * * and to sell defendant's stock in said company;" that it was agreed that defendant would pay to

265 I.A. 387
 265 I.A. 387
 265 I.A. 387

3846

PATRICIA J. GILBERT,
 Appellee.

v.

ARTHUR J. GILBERT,
 Appellant.

THE JUDICIAL OFFICE OF THE DISTRICT COURT OF THE DISTRICT OF COLUMBIA

On July 14, 1931, following the verdict of a jury in an action in rem to recover money for claims attorney's fees, plaintiff obtained a judgment against defendant in the sum of \$4,000, and this appeal followed. On November 14, 1931, after the appeal had been perfected, defendant's claim on September 14, 1931, was assigned of record, and it was ordered that Cohen and Ida H. Brown, executors of his last will, be substituted as appellants.

Plaintiff's action was commenced on March 4, 1930. In his declaration, containing of one special count, he alleged in substance that on or about December 7, 1927, he was a duly licensed attorney-at-law, practicing his profession in Chicago; that defendant was a large stockholder and officer of the Helman Consolidated Coking Co., a corporation (hereinafter called the company), which then was indebted to him for back salary as such officer; that there had been controversy between defendant and other officers of the company as to its affairs and the conduct of its business; that on said day, at Chicago, defendant employed plaintiff as an attorney to represent him in said controversy and conditions then existing, and plaintiff accepted the employment and then and there undertook to represent defendant "in said controversy" and to sell defendant's stock in said company; that it was agreed that defendant would pay to

plaintiff for said services "one-half of all sums of money received for the sale of defendant's said stock over and above the sum of \$300,000, and also all over the sum of \$6,000 received by defendant for salary due and owing him as an officer of said company;" that thereafter plaintiff rendered for defendant "various and extended services;" that on April 9, 1928, plaintiff, with defendant's approval, "caused to be made a sale of defendant's stock in said company for the sum of \$335,722, and an adjustment of defendant's claim for said salary at \$7500;" that thereafter on June 27, 1928, said sums, aggregating \$343,222 were paid to and accepted by defendant for his stock holdings in the company and in full discharge of his claim against it for said salary; that by means whereof and under the terms of said contract defendant became indebted to plaintiff in "the sum of \$19,361" (being \$17,861, or one-half of \$35,722, and \$1500 for said salary over and above \$6,000); that on said sum of \$19,361, defendant has paid to plaintiff \$5,800, "to apply on account;" and that there is now due to plaintiff the net sum of \$13,561, together with interest thereon at the legal rate from June 27, 1928, which said sum defendant, although often requested, has refused to pay, etc.: To plaintiff's damage, etc.

On May 1, 1930, defendant filed a plea of the general issue and an affidavit of defense specifying the nature thereof. Subsequently this affidavit was stricken and he was given leave to amend. On March 24, 1931, he filed a third amended affidavit of defense, and a notice of special matters of defense to be relied upon at the trial. In said notice it is stated in substance that on the trial defendant "will give in evidence and insist" (a) that during November, 1927, defendant called at plaintiff's law office and employed him to represent defendant in the matter of his claims against the McLaren Company upon the implied contract that plaintiff

plaintiff for said services "one-half of all sums of money received for the sale of defendant's said stock over and above the sum of \$300,000, and if all over the sum of \$2,000 received by defendant for salary due and owing him as an officer of said company;" that thereafter plaintiff rendered for defendant "various and extended services;" that on April 9, 1928, plaintiff, with defendant's approval, "consented to be made a sale of defendant's stock in said company for the sum of \$234,732, and an adjustment of defendant's claim for said salary at \$7500;" that thereafter on June 27, 1928, said sums, aggregating \$45,732 were paid to and accepted by defendant for his stock holdings in the company and in full discharge of his claim against it for said salary; that by means whereof and under the terms of said contract defendant became indebted to plaintiff in "the sum of \$19,561" (being \$17,061, or one-half of \$34,122, and \$1900 for said salary over and above \$2,000); that on said sum of \$19,561, defendant has paid to plaintiff \$2,800, "to apply on account;" and that there is now due to plaintiff the net sum of \$17,061, together with interest thereon at the legal rate from June 27, 1928, which said sum defendant, although often requested, has refused to pay, etc.: To plaintiff's damage, etc.

On May 1, 1930, defendant filed a plea of the general issue and an affidavit of defense specifying the nature thereof. Subsequently this affidavit was withdrawn and he was given leave to amend. On March 24, 1931, he filed a third amended affidavit of defense, and a notice of appeal wherein it became to be relied upon at the trial. In said notice it is stated in substance that on the trial defendant "will give in evidence and insist" (a) that during November, 1927, defendant called at plaintiff's law office and employed him to represent defendant in the matter of his claim against the Western Company upon the implied contract that plaintiff

should be paid for his services what they reasonably were worth; (b) that no express promise, either verbal or written, ever was made by defendant to plaintiff to pay him any definite sum for his services; (c) that defendant did not on December 7, 1927, or at any other time, make the express verbal contract as charged in plaintiff's declaration; and (d) that after plaintiff had rendered the services, his claim for attorney's fees was compromised and settled for \$5800, which sum was paid by defendant, and received by plaintiff, "in full settlement and discharge" of any and all claims which plaintiff had against defendant for said services. The nature of defendant's defense, as set forth in the third amended affidavit, is substantially the same as stated in the notice. On April 4, 1931, the court denied plaintiff's written motion to strike from the files said affidavit and notice.

On the trial a mass of oral and documentary evidence was introduced, - much of which was unnecessary in view of the issues made by the pleadings. Plaintiff testified in his own behalf and V. P. Sherwin (employed as a secretary and typewriter in plaintiff's office), H. S. Talbott (who purchased of defendant his stock in the company) and Jay F. Wood (a handwriting expert) were witnesses for him. Defendant testified in his own behalf, and called as witnesses Mrs. Ida Brown, (his daughter and his assistant in his business,) and Rudolph P. Salmon (a handwriting expert). There also was read to the jury portions of the deposition of Dr. Irwin Schiff, a son-in-law of defendant and a physician by profession, who, in July, 1928, and thereafter, was a resident of Brooklyn, New York.

The uncontradicted evidence disclosed that from about the middle of November, 1927, and up to about July 1, 1928, plaintiff at intervals rendered certain attorney's services to defendant at the latter's request. On the issue whether on or about December 7, 1927,

should be paid for his services and they reasonably were worth;

(b) that he agreed to make, either verbal or written, over was made by defendant to plaintiff to pay him any balance due for his services; (c) that defendant did not on December 7, 1937, or at any other time, make the express verbal contract as charged in plaintiff's declaration; and (d) that after plaintiff had rendered the services, his claim for attorney's fees was compromised and settled for \$250.00, which sum was paid by defendant, and received by plaintiff, in full settlement and discharge of any and all claims which plaintiff had against defendant for said services. The nature of defendant's defense, as set forth in the third amended affidavit, is substantially the same as stated in the notice. On July 1, 1938, the court denied plaintiff's written motion to strike from the files said affidavit and notice.

In the trial a mass of oral and documentary evidence was introduced, - much of which was unnecessary in view of the issues made by the pleadings. Plaintiff testified in his own behalf and V. P. Brown (employed as a secretary and typewriter in plaintiff's office), E. A. Talbot (who purchased of defendant his stock in the company) and Jay T. ... (a handwriting expert) were witnesses for him. Defendant testified in his own behalf, and called as witnesses Mrs. Ida Brown, (his daughter and his assistant in his business), and Rudolph E. Brown (a handwriting expert). There also was read to the jury portions of the deposition of Mr. Irwin Schmitt, a non-in-law of defendant and a physician by profession, who, in July, 1938, and thereafter, was a resident of Brooklyn, New York.

The controverted evidence disclosed that from about the middle of November, 1937, and up to about July 1, 1938, plaintiff at intervals retained certain attorney's services to defendant at the latter's request. On the issue whether on or about December 7, 1937,

the parties made the express oral contract as alleged in plaintiff's declaration, the evidence was conflicting. Plaintiff's testimony, corroborated by that of his witness, Sherwin, was to the effect that such a contract was made, while defendant's testimony, corroborated by that of his witness, Mrs. Brown, was to the contrary and that the understanding between the parties was that defendant would pay to plaintiff such fees as his services, from time to time to be rendered, reasonably were worth. On the issue raised by defendant's notice of special defense (whether after plaintiff's services had been rendered there was a final compromise settlement made about July 13, 1928, of plaintiff's claim) the evidence also was conflicting. But, on this issue, we are of the opinion that a clear preponderance of the evidence disclosed that such a final settlement in fact was made, that the jury's verdict is against the weight of the evidence and that the judgment in question should not be allowed to stand.

Defendant's evidence disclosed that on July 5, 1928, plaintiff mailed to defendant at Brooklyn the following bill for expenses and services:

"Expenses (itemized)		\$250.61
Less paid on expense Feby. 1/28		<u>200.00</u>
Balance due expense		50.61
As per agreement		
You were paid for stock	\$339,722	
Less minimum	<u>300,000</u>	
	39,722	
O'Keeffe half		\$19,861.00
You were paid for services	\$7,500	
Less minimum	<u>6,000</u>	
O'Keeffe share		<u>1,500.00</u>
Total		\$21,411.61
Less paid as retainer Jany. 23/28		<u>200.00</u>
Balance due		\$21,211.61

On July 10, 1928, defendant, having received the bill, wrote to plaintiff at Chicago in part as follows: "I have received yours of July 5th, with bill enclosed. To say the least I was, and still am, astounded at your demand. * * I never agreed to pay you any specific sum for your services, nor did we ever discuss your

The parties made the express oral contract as alleged in Plaintiff's declaration, the evidence was conflicting. Plaintiff's testimony, corroborated by that of his witness, Mrs. Brown, was to the effect that such a contract was made, while Defendant's testimony, corroborated by that of his witness, Mrs. Brown, was to the contrary and that the understanding between the parties was that Defendant would pay to Plaintiff such fees as his services, from time to time to be rendered, reasonably were worth. On the issue raised by Defendant's notice of special defense (whether after Plaintiff's services had been rendered there was a final complete settlement made about July 18, 1933, of Plaintiff's claim) the evidence also was conflicting. But, on this issue, we are of the opinion that a clear preponderance of the evidence discloses that about a final settlement in fact was made, that the jury's verdict is against the weight of the evidence and that the judgment in question should not be allowed to stand.

Defendant's evidence discloses that on July 8, 1933, Plaintiff mailed to Defendant at Franklin the following bill for expenses and services:

Balance due	151.21
Less paid as retainer July 1933	25.00
Total	126.21
O'Leary share	63.10
Less retainer	25.00
You were paid for services	38.10
O'Leary's half	19.05
You were paid for stock	333.75
Less retainer	100.00
As per agreement	233.75
Balance due	233.75

Balance due	210.80
Less paid as retainer July 1933	25.00
Total	185.80
O'Leary share	92.90
Less retainer	25.00
You were paid for services	160.80
O'Leary's half	80.40

On July 10, 1933, Defendant, having received the bill, wrote to Plaintiff at Chicago in part as follows: "I have received yours of July 8th, with bill enclosed. To say the least I was, and still am, astounded at your demand. * * I never agreed to pay you any specific sum for your services. nor did we ever discuss your

fees using as a basis the amounts to be received by me for my stock, and on salary account. I want to pay you for your services rendered; and have no desire to deprive you of anything to which you are entitled. * * As I understand, you intend to be in New York sometime this month. I will be pleased to have you call, and we can then endeavor to agree on a proper figure. This would be the best way to discuss the matter, owing to my present condition of health." On July 12, 1928, plaintiff replied by letter, acknowledging receipt of defendant's letter and writing in part: "The a/o as rendered is correct. * * There should not have been any question as to your consideration of my services and at once. Nor shall there be any other bill rendered. I believe, however, in being courteous, especially so in consideration of your illness. * * * Since you make the request that I come to see you I will be pleased to do so. * * It will probably be within 15 days."

Defendant's evidence further disclosed that plaintiff and defendant, on July 18, 1928, in the presence of Dr. Schiff, had a protracted interview regarding a settlement of plaintiff's claim for services; that it was had in Dr. Schiff's home in Brooklyn in a room where defendant was lying in bed, ill; and that a final settlement of plaintiff's claim then was made by defendant delivering his check for \$5,600, payable to plaintiff's order, which he accepted and thereafter cashed. The original check, dated July 18, 1928, drawn on the First National Bank of Brooklyn, and stamped "paid", was introduced in evidence, and a photostatic copy of the face and back of the check is contained in the present transcript. On the back there are, besides others, three endorsements in the following order: (1) "Paid in full" (in handwriting); (2) "Pay Illinois Merchants Trust Company, Chicago, or order" (by rubber stamp); and (3) plaintiff's signature (written in ink at an angle.) A portion

these being as a basis the amount to be received by me for my stock, and on salary account. I want to say for your reference rendered, and have no desire to deprive you of anything to which you are entitled. * * As I understand, you intend to be in New York sometime this month. I will be pleased to have you call, and we can then endeavor to agree on a proper figure. This would be the best way to discuss the matter, owing to my present condition of health. On July 12, 1932, plaintiff replied by letter, acknowledging receipt of defendant's letter and writing in part: "The \$/c as rendered is correct. * * There should not have been any question as to your consideration of my services and as such, for shall there be any other bill rendered. I believe, however, in being courteous, especially so in consideration of your illness. * * * Since you make the request that I come to see you I will be pleased to do so. * * It will probably be within 15 days."

Defendant's witness further disclosed that plaintiff and defendant, on July 12, 1932, in the presence of Dr. Schell, had a protracted interview regarding a settlement of plaintiff's claim for services that it was had in Dr. Schell's home in Brooklyn in a room where defendant was lying in bed, ill and that a final settlement of plaintiff's claim then was made by defendant delivering his check for \$5,000, payable to plaintiff's order, which he accepted and thereafter cashed. The original check, dated July 12, 1932, drawn on the First National Bank of Brooklyn, and stamped "paid", was introduced in evidence, and a photographic copy of the front and back of the check is contained in the present transcript. On the back there are, besides others, three endorsements in the following order: (1) "paid in full" (in hand writing); (2) "Ray Williams" (Mechanics Trust Company, Chicago, or agent" (by ink stamp); and (3) plaintiff's signature (written in ink as an endorser). A portion

of the second endorsement (i.e., the rubber stamp) interferes with the lower part of the letter "f" in the endorsement "paid in full," and plaintiff's signature interferes with several portions of said second endorsement and with both letters "l" in said first endorsement, "paid in full." As to what occurred at said interview the testimony of both defendant and Dr. Schiff was to the effect that after much talk, and the making of numerous propositions back and forth, it was agreed between defendant and plaintiff that plaintiff should receive in full settlement of his claim for services and expenses the total sum of \$6,000; and that, as plaintiff had already received from defendant \$400 in two payments by checks of \$200 each, defendant would give to plaintiff a check for \$5,600, in final adjustment of the controversy; that thereupon Dr. Schiff in his handwriting filled out said \$5,600 check and, handing it to defendant, the latter signed it; that thereupon, at defendant's request, Dr. Schiff, in his handwriting placed the first endorsement on the check, "paid in full;" and that thereupon the check was given to plaintiff and he took it away with him. Plaintiff's testimony was to the effect that the giving of the check to him was understood at the time to be only a payment "on account"; that he did not accept the check in satisfaction of all his claims against defendant; and that at the time he received it, and when he thereafter cashed it in Chicago, there was no endorsement thereon "paid in full." His said secretary, Sherwin, testified that he saw the check in plaintiff's office, after plaintiff's return to Chicago, and that then "there were no marks, either stamps or writing, on the back of the check," and that "this mark across the top of the back of the check, 'paid in full,' was not there." Defendant's witness, Salmon, a handwriting expert, testified in substance that he had made an examination of the check "to ascertain whether the words 'paid in full' were upon it at the time the blue

of the second endorsement (i.e., the rubber stamp) interfered with the lower part of the letter "T" in the endorsement "paid in full." and Plaintiff's signature interfered with several portions of said second endorsement and with the letters "I" in said first endorsement, "paid in full." As to what occurred at said interview the testimony of both defendant and Dr. Schill was to the effect that after much talk, and the making of numerous propositions back and forth, it was agreed between defendant and Plaintiff that Plaintiff should receive in full settlement of his claim for services and expenses the total sum of \$6,000; and that, as Plaintiff had already received from defendant \$200 in two payments by checks of \$100 each, defendant would give to Plaintiff a check for \$5,800, in final settlement of the controversy; that thereupon Dr. Schill in his handwriting filled out said \$5,800 check and, handing it to defendant, the latter signed it; that thereupon, at defendant's request, Dr. Schill, in his handwriting placed the first endorsement on the check, "paid in full," and that thereupon the check was given to Plaintiff and he took it away with him. Plaintiff's testimony was to the effect that the giving of the check to him was understood at the time to be only a payment "on account"; that he did not receive the check in satisfaction of all his claims against defendant and that at the time he received it, and when he thereafter cashed it in Chicago, there was no endorsement thereon "paid in full." He was accordingly, however, testified that he saw the check in Plaintiff's office, after Plaintiff's return to Chicago, and that then "there were no marks, either stamps or writing, on the back of the check," and that "this was across the top of the back of the check," "paid in full," was not there." Defendant's witness, James A. Handwriting expert, testified in substance that he had made an examination of the check "to ascertain whether the words 'paid in full' were upon it at the time the check

ink signature, which appears to be 'P. J. O'Keeffe,' was written there, and also the rubber stamp;" and that in his opinion "the words 'paid in full' were on the check before the rubber stamp was impressed upon the paper," and that said words "were there before the signature 'P. J. O'Keeffe' was placed thereon." Plaintiff's witness Wood, also a handwriting expert, testified in substance that after having made an examination of the check he "has no opinion as to whether or not the words 'paid in full' are written over or under the rubber stamp;" that he is unable to say that "the name 'O'Keeffe' is either over or under the words 'paid in full;'" that his "impression" is that the letter "f" in the word "full" "superimposes and goes over the stamp;" but that it is only an "impression" and that he "would not want anyone to decide a case against me on the same kind of an impression."

Mrs. Ida Brown, defendant's daughter, testified that she was at Dr. Schiff's home on the day in July, 1928, when plaintiff called there and had an interview with defendant; that after the interview had ended she met plaintiff in the home and had a short conversation with him; that he then told her that "he was glad to say that his account with my father was settled satisfactorily" and that "he had received a check for \$5600 from my father that paid him in full for his services." Plaintiff, while admitting having had a short conversation with Mrs. Brown at said time and place, denied that he had made any such statements to her as she testified.

As above stated, we think that on the issue, whether a final settlement of plaintiff's claims against defendant was made on July 18, 1928, and said claims were satisfied, the jury's verdict is manifestly against the weight of the evidence. It is unnecessary for us to discuss any of the other grounds urged by defendant's counsel for a reversal of the judgment. Accordingly, the judgment of

...the witness, who appears to be J. J. O'Keefe, was written
there, and also the words "and that in his opinion the
words 'said in full' were on the card before the rubber stamp
was impressed upon the paper," and that said words "and that
before the statement 'J. J. O'Keefe' was placed thereon," "plain-
ly's absence from, also a handwritten report, testified in sub-
stance that after having made an examination of the check he "has
no opinion as to whether or not the words 'said in full' are written
over or under the rubber stamp," that he is unable to say that "the
name 'O'Keefe' is either over or under the words 'said in full';"
that his "impression" is that the letters "i" in the word "full"
"suggests" and goes over the stamp; but that it is only an
"impression" and that he "would not want anyone to decide a case
against me on the basis of an impression."

...the witness, defendant's daughter, testified that she
was at Mr. O'Keefe's home on the day in July, 1933, when plaintiff
called there and had an interview with defendant; that after the
interview had ended she and plaintiff in the house and had a short
conversation with him; that he then said that "he was glad to
say that his account with my father was settled satisfactorily" and
that "he had received a check for \$500 from my father that said his
is full for his services." Plaintiff, while testifying having had a
short conversation with Mrs. Brown at said time and place, denied
that he had made any such statement to her as she testified.
...as above stated, we think that on the issue, whether a
final settlement of plaintiff's claim against defendant was made on
July 18, 1933, and said claim was satisfied, the jury's verdict is
manifestly against the weight of the evidence. It is unnecessary for
us to discuss any of the other grounds urged by defendant's counsel
for a reversal of the judgment. Accordingly, the judgment of

the superior court of July 14, 1931, is reversed and the cause is remanded.

REVERSED AND REMANDED.

Kerner, J., concurs;

Scanlan, J., took no part in the decision.

the superior court of July 14, 1911, is reversed and the same

is remanded.

REVEREND AND HONORABLE.

KELLEY, J., concurring.

KEARNEY, J., took no part in the decision.

35414

NORA McGLASSON,
Defendant in Error,

v.

ESTATE OF MICHAEL C. DONNELLAN,
deceased, and ESTATE OF JOHN W.
DONNELLAN, deceased,
Plaintiffs in Error.

25 7
ERROR TO CIRCUIT

COURT, COOK COUNTY.

265 I.A. 598'

MR. PRESIDING JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

Petitioner (defendant in error) filed a petition in the probate court of Cook county praying that the executors of the will of Michael C. Donnellan, deceased, be ordered to pay to her the sum of \$6676.18 with interest, stating that upon such payment being made she is ready and willing to release whatever interest she may have in the estate of John W. Donnellan, deceased, under the will of his father, Michael C., and further praying that said sum be paid from the interest of said John W. in said estate of Michael C., by virtue of certain assignments made by John W. during his lifetime, and that upon failure of the executors to make such payment they should account for the undivided one-half interest of said John W. in said estate of Michael C., deceased, etc. An answer was filed to the petition. On December 30, 1929, after a hearing, the probate court entered an order in which, after making numerous findings, it adjudged that the executors of the will of Michael C., deceased, "recognize the afore-said assignments;" that they pay over to petitioner "all of the legacy and/or interest of John W. in the estate of Michael C., not in excess, however, of the total amount, with interest, so found due as afore-said on the two notes secured by the assignments;" that petitioner upon the receipt of such payment satisfy pro tanto a certain judgment rendered in the circuit court and deliver the two notes to the clerk

WILLIAM H. HARRIS,
Plaintiff in Error,

vs.
ESTATE OF RICHARD C. HARRIS,
deceased, and WILLIAM H. HARRIS,
deceased,
Defendants.
Plaintiff in Error.

COURT, JACK COUNTY.
ORDER TO DISMISS

2021 A. 508

MR. ATTORNEY GENERAL, JACK COUNTY, TEXAS, THE COURT.

Petitioner (defendant in error) filed a petition in the probate court of Jack County praying that the executors of the will of Michael C. Harriss, deceased, be ordered to pay to her the sum of \$667.18 with interest, stating that upon such payment being made she is ready and willing to release whatever interest she may have in the estate of John C. Harriss, deceased, under the will of his father, Michael C., and further praying that said sum be paid from the interest of said John C. in said estate of Michael C., by virtue of certain assignments made by John C. during his lifetime, and that upon failure of the executors to make such payment they should account for the undivided one-half interest of said John C. in said estate of Michael C., deceased, etc. An answer was filed to the petition. On December 25, 1938, after a hearing, the probate court entered an order in which, after making numerous findings, it adjudged that the executors of the will of Michael C., deceased, "recognize the above said assignments," that they pay over to petitioner "all of the legacy and/or interest of John C. in the estate of Michael C., not in excess, however, of the total amount, with interest, so found due as above said on the two notes secured by the assignments," that petitioner upon the receipt of such payment "shall give back a certain bond" rendered in the official books and deliver the two notes to the clerk

of the probate court for endorsement thereon of the amount paid by said executors; that if the amount so paid will liquidate in full said indebtedness the two notes be marked "paid and cancelled" and delivered to said executors, and that in that event petitioner shall file in the office of the recorder of Cook county all necessary instruments, discharging said assignments, etc.; and that in the event there be a surplus of the legacy and/or interest of John W., remaining in the executors' hands after said payment to petitioner, they pay over said surplus to Matthew McDonough, executor of the will of John W., deceased, filing the receipt therefor as a voucher in their final account.

From this order or judgment of the probate court McDonough, as executor of the will of John W., prayed and perfected an appeal to the circuit court, where during January, 1931, there was a trial de novo, without a jury, at which much oral and documentary evidence was introduced. On the eve of the trial McDonough, as executor, etc., filed to petitioner's petition various pleas which raised the issues of (1) partial failure of consideration of the notes; (2) illegal consideration thereof, (3) usury; and (4) illegality of the assignments from Howard McGlasson, the son of petitioner, to her. About the same time petitioner filed in the circuit court an amendment to her petition, by the addition of a paragraph, in which she alleged in substance that she "is the actual bona fide owner of said assignments," which she secured on January 4, 1927, from said Howard McGlasson, and which were duly signed and acknowledged by him and afterwards duly recorded; that she paid for the assignments on November 1, 1926, the sum of \$9,440.67; that in purchasing them she also purchased two promissory collateral notes, each signed by John W. Donnellan in his lifetime and payable to the order of Howard McGlasson, one note being dated September 17, 1926, for \$4,000, due 10 months after date, with

interest at the rate of 7% after date, and the other note being dated October 28, 1926, for \$1500, due on or before July 17, 1927; that on November 1, 1926, she paid said Howard McGlasson the full face value of the notes, together with accrued interest; that he endorsed the notes and delivered them to her; that no part of the amounts of the notes had been paid to her; and that she is now the actual bona fide owner and holder of said notes and of said assignments.

On February 4, 1931, the circuit court, after hearing evidence, entered an order in which numerous findings were made in substantial accord with the allegations of petitioner's petition. And the court found in substance that said Michael C. Donnellan by his will (duly probated in said probate court on June 25, 1926) bequeathed to John W. Donnellan, his son, "a one-half interest in his estate, same to be paid in due course of administration;" that said John W. Donnellan died on May 24, 1927, leaving a last will which thereafter was duly admitted to probate; that subsequent to the probating of said will Nora McGlasson (petitioner) filed her claim against John W.'s estate in said probate court; that there was a judgment on the claim entered in her favor; that John W.'s estate prayed and perfected an appeal to the circuit court from the judgment; that on a trial de novo before a jury the circuit court instructed the jury to find the issues for the claimant (petitioner) in the sum of \$6,664.78; that the jury returned such verdict and on July 13, 1929, the court entered judgment against said estate in said sum; that in the finding and judgment were included the amounts of said two notes of \$4,000 and \$1500, respectively, together with a third note in the sum of \$107; that to reverse the judgment the estate of John W. sued out a writ of error in the appellate court of Illinois for the first district; that on May 29, 1930, the judgment was affirmed

interest at the rate of 7% after 1890, and the other note dated October 22, 1927, for \$1000, due on or before July 17, 1927; that on November 1, 1926, she paid said second mortgage the full face value of the notes, together with accrued interest; that she entered the notes and delivered them to her; and that she is now the owner of the notes and has paid to her; and that she is now the actual bona fide owner and holder of said notes and of said assignments.

On February 4, 1931, the circuit court, after hearing evidence, entered an order in which numerous findings were made in substantial accord with the allegations of petitioner's petition, and the court found in substance that said Michael C. Connelley, by his will (will) presented in said probate court on June 22, 1926, bequeathed to John J. Connelley, his son, "a one-half interest in his estate, same to be held in his name or administration;" that said John J. Connelley died on May 24, 1927, leaving a last will which thereafter was duly admitted to probate; that subsequent to the probate of said will John Connelley (petitioner) filed her claim against said John J.'s estate in said probate court; that there was a judgment on the claim entered in her favor; that John J.'s estate prayed and perfected an appeal to the circuit court from the judgment; that on a trial de novo before a jury the circuit court instructed the jury to find the amount for the claimant (petitioner) in the sum of \$5,000.00; that the jury returned such verdict and on July 13, 1927, the court entered judgment against said estate in said sum; that in the finding and judgment were included the amount of said two notes of \$1,000 and \$1000, respectively, together with a third note in the sum of \$100; that to reverse the judgment the estate of John J. must set aside a writ of error in the appellate court of Illinois for the first circuit; that on May 22, 1930, the judgment was affirmed

by the appellate court (McGlasson v. Estate of John W. Donnellan, deceased, 257 Ill. App. 649; opinion not published, case No. 34028), which judgment to date stands in full force and effect; that there is now due to Nora McGlasson (petitioner), by virtue of said two notes and by reason of said assignments, the sum of \$7,033.07; and that the assignments, made by John W. Donnellan since deceased, "are valid assignments, and that said Nora McGlasson has a lien against the estate of Michael C. Donnellan, deceased, as against the interest of John W., in said amount." And the court ordered and adjudged that said sum of \$7,033.07 be paid from said estate of Michael C., deceased, "in so far as the interest of John W. Donnellan is in said estate;" and that "said executors therein pay to Nora McGlasson, out of the interest of said John W. Donnellan in said estate of Michael C. Donnellan, deceased, said sum of \$7,033.07, - the same to be paid in due course of administration." It is sought by the present writ of error to reverse this judgment.

After reviewing the evidence contained in the present transcript, the former opinion of this court in said cause No. 34028, and the briefs and arguments of opposing counsel in the present cause, we are of the opinion that the judgment of the circuit court of July 13, 1929, in the action of petitioner against the estate of John W. Donnellan, deceased (which said judgment was affirmed by this court on May 29, 1930) is res adjudicata as to the main contentions now raised by counsel for plaintiffs in error for a reversal of the judgment of February 4, 1931. Those contentions were all urged and argued in the former litigation and finally adjudicated. In Teel v. Dunnington, 230 Ill. 475, 435-6, it is said: "It has frequently been held by this court that where some controlling fact or question material to the determination of both causes of action has been determined

by the applicant (Richard W. Estate of John W. Estate)
December 27, 1937. The applicant has paid \$100.00
which is to be paid in full to the estate of John W. Estate
that there is now no more to be paid (Richard W. Estate)
of said estate and of course of said applicant, the sum of
\$100.00; and that the applicant, now by John W. Estate
also known, "the said applicant, and that said John W. Estate
has a lien against the estate of Richard W. Estate, December, as
against the interest of John W. Estate, and the court
ordered and adjudge that said sum of \$100.00 be paid to the
estate of Richard W. Estate, "in as far as the interest of
John W. Estate is in said estate" and that "said estate thereon
pay to said Richard W. Estate, and of the interest of said John W. Estate
in said estate of Richard W. Estate, be paid, said sum of
\$100.00. - the sum to be paid in the course of administration."
It is hereby by the court that in order to reverse this judgment.
After reviewing the evidence submitted in the present
case, the court is of opinion that the judgment of the court is correct
and the writ of prohibition of course is denied in the present case.
as of the opinion that the judgment of the court is correct
and the writ of prohibition is denied in the case of John W.
Estate, December (said sum of \$100.00) is hereby by the court
on May 23, 1938 (to the estate of John W. Estate) now
reversed by counsel for plaintiff in order for a reversal of the judg-
ment of February 4, 1937. The evidence now all right and correct
in the former litigation was finally established. In fact, it is
now. The sum of \$100.00, as to said "it has previously been held by
this court that where some controlling fact or question material
to the determination of such case of action has been determined

in a former suit and the same fact or question is again at issue between the same parties, its adjudication in the first will, if properly presented, be conclusive of the same question in the latter suit, irrespective of whether the cause of action is the same in both suits or not." In People v. Chicago, etc. R. Co., 247 Ill. 340, 343, it is said "Neither the parties to an action nor persons in privity with them can re-litigate any fact or question actually or directly in issue in such suit which was passed upon and determined by a court of competent jurisdiction, * * ." Furthermore, there is nothing contained in the present transcript that would warrant us in sustaining any of said main contentions. There are other minor points urged as grounds for a reversal of the judgment, but after considering them we find them to be lacking in substantial merit.

The judgment of the circuit court of February 4, 1931, should be affirmed, and it is so ordered.

AFFIRMED.

Kerner and Scanlan, JJ., concur.

in a former suit and the court took or suggested as given at issue between the two parties, the objection in the first will, it properly presented, as conclusive of the same question in the latter suit, irrespective of whether the cause of action in the same in both suits or not. In People v. City of New York, 100 N.Y. 360, 363, it is said: "The objection that the parties to an action are not persons in privity with them can only be made if the question actually or directly in issue in such suit shall have been determined by a court of competent jurisdiction, and upon the facts of the case, there is nothing contained in the present transcript that would warrant us in concluding any of said suits to be a reversal of the judgment, but after considering them as final, there to be lacking in substantial merit."

The judgment of the circuit court of February 4, 1901, should be affirmed, and it is so ordered.

ATTEST.

Kearney and Jackson, J.C., Clerk.

35292

R. J. REHM,
Complainant,

v.

CHARLES E. VERHUNCE et al.,
Defendants.

R. J. REHM et al.,
Defendants in Error,

v.

CHARLES E. VERHUNCE,
Plaintiff in Error.

267
ERROR TO CIRCUIT
COURT, COOK COUNTY.

265 I.A. 598²

MR. JUSTICE KERNER DELIVERED THE OPINION OF THE COURT.

Complainant, R. J. Rehm, filed his amended bill to foreclose a trust deed dated April 1, 1929, executed by Union Bank of Chicago as trustee, given to secure a note of said trustee for \$10,000. Charles E. Verhunce, Mary E. Verhunce, Union Bank of Chicago as trustee, and Chicago Title & Trust Company as trustee, filed answers to the bill. Stockman Construction Company also filed its answer in the nature of an intervening petition claiming a mechanic's lien. The cause was referred to a master to take testimony and report his conclusions of law and fact. He filed his report, in which he recommended that the court enter a decree to foreclose in favor of complainant, and a decree granting a mechanic's lien in favor of Stockman Construction Company. Objections to the report were ordered to stand as exceptions, which after hearing were overruled, and on April 6, 1931, the chancellor entered a decree in conformance with the findings and recommendations of the master. The amount found due complainant by the decree was \$12,203.99, and to Stockman Construction Company \$7,427.76. To reverse this decree

28282

R. J. BARR,
Complainant,

v.

CHARLES E. VERMONT,
Defendant.

R. J. BARR et al.,
Defendants in error,

v.

CHARLES E. VERMONT,
Plaintiff in error.

ORDER TO DISMISS

COURT, COOK COUNTY.

285 I.A. 598

THE JUDICIAL COUNCIL HAS THE HONOR TO THE COURT.

Complainant, R. J. Barr, filed his answer to the fore-

closure a trust deed dated April 1, 1923, executed by Union Bank of

Chicago as trustee, given to secure a note of said trustee for

\$10,000. Charles E. Vermont, by R. J. Barr, Union Bank of

Chicago as trustee, and Chicago Title & Trust Company as trustee,

filed answers to the bill. Chicago Construction Company also filed

its answer in the matter of an intervening petition claiming a

mechanic's lien. The same was referred to a master to take testi-

mony and report his conclusions of law and fact. He filed his

report, in which he recommended that the court enter a decree to

foreclose in favor of complainant, and a decree granting a mechanic's

lien in favor of Chicago Construction Company. Objections to the

report were entered to stand as exceptions, which after hearing

were overruled, and on July 1, 1923, the chancellor entered a decree

in conformity with the findings and recommendations of the master.

The amount found due complainant by the decree was \$12,502.92, and

to Chicago Construction Company \$7,417.76. To reverse this decree

Charles E. Verhunce sued out a writ of error.

The amended bill alleges that on April 1, 1929, the Union Bank of Chicago as trustee, being indebted in the sum of \$10,000, executed its principal note No. 1 in that amount, payable to bearer on or before October 1, 1929, with interest at six per cent per annum until maturity, which interest was evidenced by interest note No. 1a, dated April 1, 1929; that both of said notes were duly executed by the Union Bank of Chicago, trustee under a trust agreement known as Trust No. 2260, and were by it for value delivered; that to secure the payment of the notes Union Bank of Chicago as trustee, executed a trust deed on certain real estate in Chicago to Chicago Title & Trust Company as trustee, and thereafter complainant became, was and still is the owner and holder of said notes and trust deed. The bill further contained the usual allegations of foreclosure bills and alleged the failure to pay the principal and interest due October 1, 1929. The answers filed neither admitted nor denied the allegations to the amended bill.

The record discloses that complainant after proving the execution of the notes and trust deed offered them in evidence and they were received without objection. It is now claimed that it was incumbent upon complainant to prove ownership of the notes and trust deed; that no evidence was offered by the complainant tending to prove he was the owner of the notes and trust deed and entitled to bring these proceedings. This contention has no merit whatever. There is not a scintilla of evidence in the record that the principal note was not given for a good and valuable consideration or that there was any defense of any kind or nature to the note. The complainant had possession of the note and brought it to the court and caused it to be merged in the decree in the instant case. Under such circumstances he will be presumed to be the owner of the note in the absence of any

Charles E. Verhagen and a will of error.

The amended bill alleges that on April 1, 1929, the

Union Bank of Chicago as trustee, being indebted in the sum of \$10,000, executed its principal note No. 1 in that amount, payable to bearer on or before October 1, 1929, with interest at six per cent per annum until maturity, which interest was evidenced by interest note No. 1a, dated April 1, 1929; that both of said notes were duly executed by the Union Bank of Chicago, trustees under a trust agreement known as Trust No. 2280, and were by it for value delivered; that to secure the payment of the notes Union Bank of Chicago as trustee, executed a first deed on certain real estate in Chicago to Chicago Title & Trust Company as trustee, and thereafter complainant became, was and still is the owner and holder of said notes and first deed. The bill further contains the usual allegations of forcefulness and alleged the failure to pay the principal and interest due October 1, 1929. The answers filed neither admitted nor denied the allegations of the amended bill.

The record discloses that complainant after proving the execution of the notes and first deed offered them in evidence and they were received without objection. It is now claimed that it was incumbent upon complainant to prove ownership of the notes and first deed; that no evidence was offered by the complainant tending to prove he was the owner of the notes and first deed and entitled to bring these proceedings. This contention has no merit whatever. There is not a scintilla of evidence in the record that the principal note was not given for a good and valuable consideration or that there was any defense of any kind or nature to the note. The complainant had possession of the note and brought it to the court and caused it to be merged in the decree in the instant case. Under such circumstances he will be presumed to be the owner of the note in the absence of any

showing to the contrary. (Gilmore v. German Savings Bank, 89 Ill. App. 442; Hoff v. Dougherty, 243 Ill. App. 159, 161; Boudinot v. Winter, 190 Ill. 394.) When complainant introduced in evidence the notes and trust deed and proved the notes were not paid at maturity, such evidence made a prima facie case sufficient to entitle him to a decree of foreclosure. (Foreman Trust and Savings Bank v. Cohn, 342 Ill. 280, 287.)

The next question raised is that there is no evidence shown in the record which would warrant the court in allowing the complainant certain expenditures for stenographer, sheriff, clerk and publication fees and the cost of foreclosure minutes. Even so, we are of the opinion that plaintiff in error is not now in a position to question it. His exceptions to the master's report do not point out specifically any such defect. His exception No. 7 does, in general terms, object that the proof failed to sustain the master's finding of the account as stated in the report. The exceptions are the pleadings to the items of the account, and must be specific and not general. (Moffett v. Hanner, 154 Ill. 649, 655.) Neither the chancellor nor a court of review could, by such a general objection, be required to go over the entire record and restate the account. (Farwell v. Huling, 132 Ill. 112, 114; Springer v. Kreschell, 161 id. 358, 370; Dorn v. Farr, 179 id. 110.)

It is next urged that the Stockman Construction Co. has failed to make the same case by its proofs that it made by its answer in the nature of an intervening petition, plaintiff in error contending that the claim of the Stockman Construction Co. proceeded on the theory that the plaintiff in error, as the owner, abandoned the work and prevented the Stockman Construction Co. from performing its contract, and that in view of said abandonment and breach it was entitled to maintain and enforce its claim for a mechanic's lien for

that part of the contract which it had performed.

From the evidence it appears that on October 16, 1929, the Union Bank of Chicago as trustee, the legal owner, and Charles E. Verhunce, the equitable owner of the real estate involved in this cause, entered into a contract with the Stockman Construction Co., by which Stockman Construction Co., agreed to furnish masonry, carpentry, painting, decorating and cement work for \$92,900; that on October 20, 1929, Stockman Construction Co., commenced work and put in certain foundation work, window frames, and furnished labor and material valued at \$7,349.54; that the last work performed was during the week ending December 20, 1929; that Eric R. Stockman as agent of Stockman Construction Co., had several conversations with Verhunce, the first of which was about the time work was commenced, at which Verhunce said he was going to obtain a loan with which he was going to pay for the erection of the building; later, just before the work was discontinued, he had another conversation with Verhunce, at which Verhunce said he was unable to get a loan; that the Chicago City Bank had turned him down on the loan and that Stockman Construction Co., "better not do anything further until I get a loan. * * * not to complete the building as he had no finances." No work was done after this conversation and the Stockman Construction Co., was not at any time thereafter requested to proceed with its contract.

Plaintiff in error's version was that he met Eric R. Stockman at the premises but that he did not tell him the Stockman Construction Co., had not better do anything further until he (Verhunce) got a loan; nor did he ask Stockman to quit work. He further testified that at this meeting at the premises ^{Stockman} ~~Verhunce~~ told him they would not go ahead with the work until he (Verhunce) had the loan; that thereupon he informed Stockman he was working on the loan and very shortly expected to have the negotiations completed;

that part of the contract which it had performed.

Now the witness is aware that on October 14, 1933, the Union Bank of Chicago is trustee, the legal owner, and trustee of the property.

Mr. Verneer, the negotiable owner of the real estate involved in this case, entered into a contract with the Cookman Construction Co., by which Cookman Construction Co., agreed to furnish carpentry, painting, decorating and cement work for \$32,900; that on October 20, 1933, Cookman Construction Co., commenced work and put in certain foundation work, window frames, and furnished labor and material valued at \$7,349.84; that the first work performed was during the week ending December 30, 1933; that Mr. Cookman as agent of Cookman Construction Co., had several conversations with Verneer, the first of which was about the time work was commenced, at which Verneer said he was going to obtain a loan with which he was going to pay for the erection of the building; later, just before the work was discontinued, he had another conversation with Verneer, at which Verneer said he was unable to get a loan; that the Chicago City Bank had turned him down on the loan and that Cookman Construction Co., "better not be expecting further until I get a loan." * * * not to complete the building as he had no finances. No work was done after this conversation and the Cookman Construction Co., was not at any time thereafter requested to proceed with its contract.

Witness in error's version was that he met Mr. R. Cookman at the premises and that he did not tell him the Cookman Construction Co., had not better be expecting further until he (Verneer) got a loan; not did he ask Cookman to quit work. He further testified that at this meeting at the premises he told him they would not proceed with the work until he (Verneer) had the loan; that thereafter he informed Cookman he was working on the loan and very shortly expected to have the negotiations completed;

that if Stockman stopped the work it would make it very much harder for him to negotiate a loan. On cross examination he testified that he told Stockman he would have to make different financial arrangements, but that he never made these additional arrangements.

By the decree the chancellor found inter alia that Verhunce caused further progress of the building to be stopped and refused to proceed with the erection and construction of the building despite frequent demands that he proceed with the construction of the building. After an examination of all the evidence, we are of the opinion that the evidence justified the findings of the chancellor. There is no material difference between "stopping and refusing to proceed" and "abandoned the work and prevented the Stockman Construction Co. from performing its contract." There is no substantial variance between the allegations of the answer and the proofs.

It is also contended that the decree should be reversed because the court allowed Stockman Construction Co. a lien for \$7,427.76, in which was included nonlienable items. There is merit in this contention. It is elementary that a mechanic's lien can be allowed only for such work as constitutes a permanent improvement. (Fehr Const. Co. v. Postl System of Health Bldg., 139 Ill. App. 519; Hoier v. Kaplan, 313 Ill. 443.) From the evidence it appears that included in the amount of \$7,427.76 are the following items: Amounts expended for permits \$392; amount expended for straw \$7.50; amount expended for return of bricks not used in the construction of the building \$266.60; amount charged Stockman Construction Co. for door and window frames, all of which were not installed in building \$700; and \$402.40 for interest to November 20, 1930. The amounts expended for permits for straw and the return of brick cannot be considered permanent improvements to the premises and it is not clear what

amount is due Stockman Construction Co., for the frames actually used in the improvement of the premises, or delivered for the purpose of being used in the structure. Plaintiff in error was also charged an improper amount for interest. After deducting the above nonlienable items the interest on the balance from December 5, 1929, to April 6, 1931, the date of the decree, amounts to \$377.27.

We have considered the remaining arguments of counsel but find no merit therein.

The decree of the Circuit court will be affirmed in favor of R. J. Rehm, and that portion of the decree wherein the Stockman Construction Co. is awarded the sum of \$7,427.76 is reversed, and the cause is remanded with directions to so modify the decree as to award a mechanic's lien on the premises in favor of Stockman Construction Co. in the sum of \$6,056.53.

AFFIRMED IN PART, REVERSED IN PART
AND REMANDED.

Gridley, P. J., and Scanlan, J., concur.

amount in the American Gas Company Co., for the interest payable
 used in the improvement of the premises, as delivered for the
 purpose of being used in the premises. The interest in such was
 also charged on interest amount for interest. After deducting
 the above mentioned items the interest on the balance from
 December 3, 1930, to April 6, 1931, the date of the decree,
 amounts to \$577.27.

It was concluded the remaining payments of counsel

but find no merit therein.

The decree of the Circuit Court will be affirmed in
 favor of A. J. Johns, and that portion of the decree which in the
 American Gas Company Co. is awarded the sum of \$7,427.76 is
 reversed, and the same is awarded with direction to so modify
 the decree as to award a mechanic's lien on the premises in favor
 of American Gas Company Co. in the sum of \$4,046.33.

IT IS ORDERED THAT, ENTERED IN 1931
 AND FORWARDED.

Widely, J. J. and Johnson, J. J. County.

35321

GEORGE J. ECKHOFF,
(plaintiff),
Defendant in Error,

v.

JOHN B. STANTON,
(defendant),
Plaintiff in Error.

277
ERROR TO MUNICIPAL
COURT OF CHICAGO.

265 I.A. 598³

MR. JUSTICE KEENER DELIVERED THE OPINION OF THE COURT.

Plaintiff sued defendant in a fourth class case in the Municipal court of Chicago for money due under a written contract. Defendant was served, filed his appearance, but failed to file an affidavit of merits, was defaulted and judgment was entered against him for \$150, for a reversal of which this writ of error has been sued out.

The statement of claim sets forth that the claim is for \$150 for the November and December, 1930, installments due and unpaid under the terms of the written contract, dated March 4, 1929, by which plaintiff agrees to sell, and John B. Stanton and Ruth T. Stanton as joint tenants and not as tenants in common, agree to buy certain real estate therein described, and provides that if the Stantons shall make the payments mentioned in the contract, plaintiff would convey to them in fee simple the said real estate. Payments to be made as follows: \$300 on the date of the contract; \$125 a month for nine months from April 1, 1929, and \$75 or more on the first of each month thereafter, until the full purchase price of \$7670 was paid. The contract also provided that if the Stantons failed to make such payments, the contract shall, at the option of plaintiff, be forfeited. Attached to the statement of claim was

an affidavit of claim. Ruth T. Stanton was not made a party defendant. On March 23, 1931, the court entered an order in which it is recited that the plaintiff has filed an affidavit showing that his claim was a suit for the recovery of money; that defendant was in default for want of an affidavit of merits, and it was ordered that default be entered against the defendant for want of an affidavit of merits and the judgment for \$150 was entered. There is no bill of exceptions.

It is contended by defendant that the measure of damages is the difference between the contract price and the fair market value of the property mentioned in the contract. There is no merit in this contention. The suit is not for damages for the breach of a contract, but is upon the promise of defendant to pay, contained in the contract made by him. Under such circumstances plaintiff is entitled to recover the amount which appears to be due on the contract. We believe Gray v. Meek, 199 Ill. 136, is controlling on the right to recover. It was held in that case that such a rule as now contended for by defendant was not applicable to the instant case. There Gray, as the agent of Meek, had the exclusive right by contract to sell certain lots for one year at certain prices, and if any lots remained unsold at the end of the year Gray was to buy such remaining lots and Meek was to sell them to him at the price agreed upon. Certain lots remained unsold and Meek sued Gray for the agreed price of the lots remaining unsold. Gray set up that the true measure of damages was the difference between the agreed price and the fair market value. The court held against Gray and Meek recovered the entire consideration for the lots not sold.

While it is true that the contract in the instant case provided that if the Stantons failed to make the payments provided for in the contract, the contract shall at the option of the plain-

an affidavit of claim. With 7. Hansen was made a party defendant. On March 25, 1931, the court entered an order in which it is recited that the plaintiff has filed an affidavit showing that his claim was a title for the recovery of money; that defendant was in default for want of an affidavit of merit, and it was ordered that default be entered against the defendant for want of an affidavit of merit and the judgment for \$100 was entered. There is no bill of exceptions.

It is contended by defendant that the measure of damages is the difference between the contract price and the fair market value of the property involved in the contract. There is a merit in this contention. The suit is not for damages for breach of a contract, but is upon the promise of defendant to pay, contained in the contract made by him. Under such circumstances plaintiff is entitled to recover the amount which appears to be due on the contract. He claims \$100,000.00. It is contending on the right to recover. It was held in that case that when a title is now contained in the defendant was not available to him as a result. There being no right of title, had the exclusive right by contract to sell certain lots for one year at certain prices, and if any lots remained unsold at the end of the year they were to pay such remaining lots and half was to sell them to him at the price agreed upon. Certain lots remained unsold and they were to pay for the unsold lots of the lot remaining unsold. They had up that the true measure of damages was the difference between the contract price and the fair market value. The court held against plaintiff and back recovered the entire consideration for the lots not sold. While it is true that the contract in the last case provided that if the defendant failed to make the payments provided for in the contract, the contract shall at the option of the plain-

tiff be forfeited, plaintiff did not exercise that option and there is nothing in the contract that a failure to pay any of the installments when due shall cause a forfeiture. Forfeiture under the contract could not take place unless the plaintiff exercised the option to declare a forfeiture. (Horworth v. Mills, 62 Utah 574; 221 Pac. 165.) In Wilson v. Loosano, 259 Ill. App. 285, 287, it was said: "By the agreement the vendor agreed to turn over to the vendee a deed to the property on the final payment, and the vendee on his part agreed to make these payments as they fell due. This was a contract and the parties were bound by it." In Queens Park Gardens v. Spar, 234 N. Y. S. 404, it was held that where a contract for the sale of land provides for partial payments of the purchase money prior to the delivery of the deed, the vendor may sue for such intermediate installments when due.

It is also urged that the judgment should be reversed because the plaintiff has failed to make Ruth T. Stanton a party defendant, that by the contract the defendant and "Ruth T. Stanton" contracted to buy the property as joint tenants and not as tenants in common and that any action predicated upon such a contract must be brought against all such vendees jointly. That fact is no ground for reversal for several reasons. First: the fact that they contracted to buy the property as joint tenants did not make them partners, and if they were, the recovery of a judgment against one party upon a partnership obligation bars a subsequent suit against the other (Fleming v. Ross, 225 Ill. 149, and cases cited); Second: the liability of several obligors under section 23, ch. 76, Cahill's Rev. Stats., 1931, p. 1736, is both joint and several. The promisee may elect to sue one only of the several obligors. (Tandrup v. Sampcell, 234 Ill. 526, 531.)

It is also noted that the judgment should be reversed because the plaintiff has failed to meet with T. Eason & Party defendants, that by the contract the defendant and "John T. Eason" contracted to buy the property on joint tenancy and not as tenants in common and that any action prosecuted upon such a contract must be brought against all such vendors jointly. That fact in no way for reversal for several reasons. First: the fact that they contracted to buy the property as joint tenants did not make them partners, and if they were, the recovery of a judgment against one party upon a partnership obligation does not constitute a bar against the other (Latham v. Latham, 200 Ill. 1-2, and cases cited) second: the liability of several obligors under section 12, Ch. 70, Latham's Rev. Stat., 1913, p. 1715, is both joint and several. The promise may elect to sue one only of the several obligors. (Latham v. Latham, 200 Ill. 1-2, 201.)

It is also noted that the judgment should be reversed because the plaintiff has failed to meet with T. Eason & Party defendants, that by the contract the defendant and "John T. Eason" contracted to buy the property on joint tenancy and not as tenants in common and that any action prosecuted upon such a contract must be brought against all such vendors jointly. That fact in no way for reversal for several reasons. First: the fact that they contracted to buy the property as joint tenants did not make them partners, and if they were, the recovery of a judgment against one party upon a partnership obligation does not constitute a bar against the other (Latham v. Latham, 200 Ill. 1-2, and cases cited) second: the liability of several obligors under section 12, Ch. 70, Latham's Rev. Stat., 1913, p. 1715, is both joint and several. The promise may elect to sue one only of the several obligors. (Latham v. Latham, 200 Ill. 1-2, 201.)

It is also noted that the judgment should be reversed because the plaintiff has failed to meet with T. Eason & Party defendants, that by the contract the defendant and "John T. Eason" contracted to buy the property on joint tenancy and not as tenants in common and that any action prosecuted upon such a contract must be brought against all such vendors jointly. That fact in no way for reversal for several reasons. First: the fact that they contracted to buy the property as joint tenants did not make them partners, and if they were, the recovery of a judgment against one party upon a partnership obligation does not constitute a bar against the other (Latham v. Latham, 200 Ill. 1-2, and cases cited) second: the liability of several obligors under section 12, Ch. 70, Latham's Rev. Stat., 1913, p. 1715, is both joint and several. The promise may elect to sue one only of the several obligors. (Latham v. Latham, 200 Ill. 1-2, 201.)

It is also noted that the judgment should be reversed because the plaintiff has failed to meet with T. Eason & Party defendants, that by the contract the defendant and "John T. Eason" contracted to buy the property on joint tenancy and not as tenants in common and that any action prosecuted upon such a contract must be brought against all such vendors jointly. That fact in no way for reversal for several reasons. First: the fact that they contracted to buy the property as joint tenants did not make them partners, and if they were, the recovery of a judgment against one party upon a partnership obligation does not constitute a bar against the other (Latham v. Latham, 200 Ill. 1-2, and cases cited) second: the liability of several obligors under section 12, Ch. 70, Latham's Rev. Stat., 1913, p. 1715, is both joint and several. The promise may elect to sue one only of the several obligors. (Latham v. Latham, 200 Ill. 1-2, 201.)

It is finally contended that under the rules of the Municipal court of Chicago no order can be entered in any case after an appearance has been entered by another party, without notice to such party, unless the cause is regularly reached for trial. The point is not well taken. It does not appear from the record that the cause was not regularly reached for trial.

We are, after an attentive examination of the record, unable to perceive any error for which the judgment of the Municipal court should be reversed, and it must be affirmed.

AFFIRMED.

Gridley, P. J., and Scanlan, J., concur.

It is finally contended that under the rules of the
Municipal Court of Chicago no entry can be entered in any case
after an appearance has been entered by another party, without
notice to such party, unless the entry is regularly reached for
trial. The point is not well taken. It does not appear from
the record that the case was not regularly reached for trial.
It was, after an extensive examination of the record,
unable to perceive any error for which the judgment of the
Municipal Court should be reversed, and it must be affirmed.

REVEREND.

Chicago, N. Y., and Columbia, N. Y. Circuit.

35326

CHARLES FORMAN et al.,
complainants,
Appellees,

v.

FRED BECKLENBERG et al.,
Defendants.

ON APPEAL OF SOL RUBIN,
Appellant.

28 7
APPEAL FROM CIRCUIT

COURT, COOK COUNTY.

265 I.A. 598⁴

MR. JUSTICE KERNER DELIVERED THE OPINION OF THE COURT.

This was originally a foreclosure ^{of a} trust deed executed by Fred Becklenberg to Charles Forman, trustee, securing a bond issue of \$140,000 on an apartment building in Chicago. November 7, 1928, the complainants obtained a decree which found that there was due Charles Forman, as trustee, \$154,480.84, and \$11,380.55 to Eli Metcoff; that they had a lien on the rents, issues and profits accruing from said premises described in the decree, and ordered that if the sale of the premises did not bring sufficient to pay the amount found due by said decree, a deficiency decree may be entered against the persons primarily liable, and in that event the receiver then in possession of the premises should continue in possession to collect the rents, issues and profits of the premises until the expiration of the period of redemption, or until any deficiency decree that might be entered has been satisfied. To reverse this decree Sol Rubin, the owner of the equity of redemption, appealed. May 31, 1929 (Forman v. Becklenberg, 253 Ill. App. 620, certiorari denied by the Supreme Court), this division of the appellate court filed an opinion affirming the decree. November 13,

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This was originally a foreclosure of the mortgage by
Fred Aschmann as Charles Norman, trustee, securing a bond issue
of \$140,000 on an apartment building in Chicago. November 7, 1928,
the complainant obtained a decree which found that there was due
Charles Norman, as trustee, \$104,864.44, and \$11,380.56 as
interest; that they had a lien on the rents, issues and profits
accruing from said premises described in the decree, and ordered
that if the sale of the premises did not bring sufficient to pay
the amount found due by said decree, a deficiency decree may be
entered against the persons primarily liable, and in that event the
receiver then in possession of the premises should continue in
possession to collect the rents, issues and profits of the premises
until the expiration of the period of redemption, or until any
deficiency decree that might be entered has been satisfied. To
reverse this decree and grant, the owner of the equity of redemption,
appealed. May 31, 1929 (Holt v. Aschmann, 133 Ill. App. 420,
certiorari denied by the Supreme Court), this division of the
Appellate Court filed an opinion affirming the decree. November 15,

1929, the premises described in the decree were sold pursuant to the decree and on November 18, 1929, the master's report of sale and distribution was approved and a deficiency decree was entered, finding that there was due Charles Forman, as trustee, \$32,089.66, and to Eli Metcoff \$11,959.05, and that Charles Forman, as trustee, and Eli Metcoff had a lien on the rents, issues and profits of the premises to the date of the expiration of the period of redemption and that the receiver theretofore appointed continue during said period of redemption. During the pendency of the foreclosure proceedings a receiver was appointed with the usual powers of receivers in such cases, and on October 23, 1929, an order was entered authorizing and directing him to pay to Charles Forman, as trustee, all the funds in his possession to be applied toward the payment of the amount due him as found in the decree of November 7, 1928. December 14, 1929, the receiver filed his current account and report from which it appears that there has been paid to Charles Forman, as trustee, \$25,000 to apply on the deficiency decree, and on February 13, 1931, he filed his final account and report from which it appears that he has paid to Charles Forman, as trustee, and Eli Metcoff the balance due them on account of the deficiency decree of November 18, 1929.

February 11, 1931, appellant filed his petition in which he alleged in substance that the \$25,000 paid to Charles Forman, as trustee, was not applied to the partial satisfaction of the decree of November 7, 1928, and that the deficiency decree was not a lien on the rents collected by the receiver before the sale of the premises and he prayed that Charles Forman be ordered to pay to him the \$25,000, which he received from the receiver. May 20, 1931, the chancellor entered an order finding that the receiver had turned over to Charles Forman, as trustee, the funds in his hands in satisfaction

1930, the proceeds described in the letter were paid pursuant to the order and on November 18, 1930, the receiver's report of sale and distribution was approved and a deficiency decree was entered, finding that there was no Charles Norman, as trustee, \$25,000.00, and to all persons \$11,000.00, and that Charles Norman, as trustee, and all persons had a lien on the estate, interest and profits of the proceeds to the date of the expiration of the period of redemption and that the receiver's report was approved during said period of redemption. During the pendency of the foregoing proceedings a receiver was appointed and the usual powers of a receiver in such cases, and on October 15, 1930, an order was entered authorizing and directing him to pay to Charles Norman, as trustee, all the funds in his possession to be applied toward the payment of the amount due him as shown in the decree of November 7, 1930. December 14, 1930, the receiver filed his account showing and report from which it appears that there has been paid to Charles Norman, as trustee, \$25,000 to apply on the deficiency decree, and on February 15, 1931, he filed his final account and report from which it appears that he has paid to Charles Norman, as trustee, and all persons the balance due them on account of the deficiency decree of November 10, 1930. February 11, 1931, application filed his petition in which he alleged in substance that the \$25,000 paid to Charles Norman, as trustee, was not applied to the partial satisfaction of the decree of November 7, 1930, and that the deficiency decree was not a lien on the funds collected by the receiver during the sale of the premises and he prayed that Charles Norman be ordered to pay to him the \$25,000, which he received from the receiver. May 27, 1931, the application stated in effect finding that the receiver had turned over to Charles Norman, as trustee, the funds in his hands in satisfaction

of the deficiency decree heretofore entered, denied the prayer of the appellant and discharged the receiver from further duty. To reverse this order Sol Rubin has appealed.

Appellant's only contention here is that the deficiency decree was not a lien on the rents collected by the receiver prior to the sale under the decree of November 7, 1928. As far as we have been able to discover, the only basis for appellant's contention is because the receiver had not paid the \$25,000 to Charles Forman before the sale of November 13, 1929, he could not legally pay the money to him after the sale. There is no merit in this contention. The decree of November 7, 1928, found that the mortgagor had pledged and that complainants had a lien on the rents accruing from said premises during the redemption period. The only purpose of appointing a receiver in a foreclosure proceeding is to preserve the security of the trust deed and apply the rents when necessary in discharge of the indebtedness, and the possession of the receiver and his receipt of the rents is for the benefit of the person entitled to the same. (Davis v. Dale, 150 Ill. 239, 243.) If the indebtedness is discharged by the sale of the premises the owner of the equity of redemption, as a general proposition, is entitled to the rents. (Hindman v. Off, 246 Ill. App. 528, 530; Shinnick v. Goodman, 259 Ill. App. 107, 114, and cases cited.) Where, however, the mortgagor pledges the rents as security and the premises fail to bring enough at the sale to pay the judgment, the mortgagee may take steps to subject the rents to pay the deficiency, and if there is a receiver he will be ordered to pay such deficiency out of the rents (Shinnick v. Goodman, supra), and a pledge of the rents during the redemption period is not extinguished by the foreclosure and sale (Powell v. Voight, 261 Ill. App. 127, 130.)

Appellees' counsel ask for the imposition of the statutory

of the defendant's claim that the defendant, during the period of the
the defendant and defendant, the defendant, the defendant, the
however this order will be reversed.
Appellant's only contention is that the defendant
acted was not a lien in the hands of the defendant, but
to the defendant the defendant of November 7, 1931, and the defendant
been able to discover, the only basis for appellant's contention is
because the receiver had not paid the \$12,000 in taxes which he
the sale of November 12, 1932, he could not legally pay the money to
him after the sale. There is no merit in this contention. The decree
of November 7, 1931, found that the mortgage was assigned and that
appellant had a lien on the taxes amounting from said premises during
the redemption period. The only purpose of appointing a receiver is
a foreclosure proceeding is to preserve the property of the trust and
and apply the rents and proceeds in discharge of the indebtedness,
and the possession of the receiver and his receipt of the rents is for
the benefit of the person entitled to the same. (Wright v. Wright, 320
111. 539, 545.) If the indebtedness is discharged by the sale of
the premises the owner of the property is not entitled, as a general
proposition, to be paid the rents. (Wright v. Wright, 320 111. 539,
328, 330; Wright v. Wright, 323 111. 547, 548, 549, 550, 551, 552, 553,
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penalty for appeals prosecuted for the purpose of delay, as provided for in section 23, ch. 33, Cahill's Rev. Stats. 1931, p. 826. That section has no application here.

The order of the chancellor denying the prayer of the petition was proper and is affirmed.

AFFIRMED.

Gridley, P. J., and Seanlan, J., concur.

generally for private transactions for the purpose of selling, as
provided for in section 112 of the Internal Revenue Act, 1913.
1913. That section has been amended since.

The effect of the amendment changes the nature of the

position and hence it is different.

REPLY.

REPLY. E. J. and Company, 1st Floor.

35330

PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,

v.

NATHAN M. FREEDMAN,
Plaintiff in Error.

29 A
ERROR TO CRIMINAL COURT,

COOK COUNTY.

265 I.A. 599

MR. JUSTICE KERNEE DELIVERED THE OPINION OF THE COURT.

Nathan M. Freedman, plaintiff in error, was found guilty of criminal contempt of court by the Criminal court of Cook county, for which he was ordered committed to the county jail for ten days and to pay a fine of \$100. To reverse this order he has sued out a writ of error. The defendant in error has not appeared or filed a brief in this court in defense of the order.

Aaron Moshiek and Morris Begolowski filed their separate amended petitions in the Criminal court of Cook county in the case of People of the State of Illinois v. Aaron Moshiek and Morris Begolowski, No. 46870, in which cause they had been adjudged guilty of the crime of conspiracy, and alleged in substance that in said cause they had furnished supersedeas bonds in the appellate court for this district, with plaintiff in error as surety, for which he had been paid \$600 in cash by Aaron Moshiek and \$1,000 by Morris Begolowski and that Aaron Moshiek had given plaintiff in error in addition to the \$600 cash a check for \$500 which Aaron Moshiek has been unable to pay; that after the payment of these sums to plaintiff and while the cause was pending in the appellate court, he (plaintiff in error) surrendered them into the custody of the sheriff of Cook county.

Plaintiff in error by his verified answer denied he

PEOPLE OF THE STATE OF ILLINOIS,
Plaintiff in Error,

v.

NATHAN E. FREEDMAN,
Defendant in Error.

2d Cir. 1933

MR. JUSTICE BREWER delivered the opinion of the court.

Nathan E. Freedman, plaintiff in error, was found guilty of criminal conspiracy of count by the criminal court of Cook county, for which he was ordered committed to the county jail for ten days and to pay a fine of \$100. To reverse this order he has sued out a writ of error. The defendant in error has not appeared on filed a writ in this court in defense of the order.

Arson Koschick and Maria Bogolowski filed their separate amended petitions in the criminal court of Cook county in the case of People of the State of Illinois v. Arson Koschick and Maria Bogolowski, No. 46870, in which case they had been adjudged guilty of the crime of conspiracy, and alleged in substance that in said case they had furnished superabundant bonds in the appellate court for this district, with plaintiff in error as surety, for which he had been paid \$600 in cash by Arson Koschick and \$1,000 by Maria Bogolowski and that Arson Koschick had given plaintiff in error in addition to the \$600 cash a check for \$500 which Arson Koschick has been unable to pay; that after the payment of these sums to plaintiff and while the case was pending in the appellate court, he (plaintiff in error) surrendered them into the custody of the sheriff of Cook county.

Plaintiff in error by his verified answer denied he

received the money alleged to have been paid to him or any part thereof, and averred that on November 17, 1929, Aaron Moshiek gave him a check dated November 19, 1929, drawn on the National Builders Bank, which he has been unable to cash for the reason that the account has been withdrawn from said bank.

On June 17, 1931, the court entered an order finding plaintiff in error guilty of contempt. In this order it is recited the cause came on to be heard on the petitions of Morris Bogelowski and Aaron Moshiek and evidence having been heard (no evidence, however, appears in the bill of exceptions), and plaintiff in error having declined to put in any evidence controverting the testimony offered by the petitioners, the court finds that Morris Bogelowski paid the plaintiff in error \$1,000 and Aaron Moshiek paid him \$650 for becoming surety on the supersedeas bonds in the appellate court for the first district of Illinois, upon which he was to remain as surety until said cause was decided in said appellate court; that thereafter and without just cause, and without rendering the services for which he had been paid, plaintiff in error caused the petitioners to be surrendered before the chief justice of the criminal court of Cook county, and being interrogated in open court by the chief justice of the Criminal court, declared that he had never been paid any money whatever for becoming surety on said supersedeas bond, which statement was false and was made with the corrupt and malicious intent to deceive the said chief justice of the Criminal court of Cook county in order to induce the said chief justice to incarcerate the petitioners in the county jail, and the chief justice, relying upon said false statement, ordered petitioners be taken into custody and committed to the county jail.

received the money alleged to have been paid to him on the part of the State, and having that on November 17, 1935, when he was given him a check dated November 17, 1935, drawn on the National Bank of Chicago, which he has been unable to cash for the reason that the account has been withdrawn from said bank.

On June 17, 1935, the court ordered an order directing plaintiff to show fully of complaint. In this order it is recited that the same was to be paid on the petition of Boris Jodelowski and Aron Gorkin and evidence having been heard (no evidence, however, appears in the bill of exceptions), and plaintiff in error having declined to put in any evidence notwithstanding the testimony offered by the petitioners, the court found that Boris Jodelowski paid the plaintiff in error \$1,000 and Aron Gorkin paid him \$500 for services rendered in the apprehension of the appellee Gorkin for the first district of Illinois, upon which he was to remain as surety until said case was decided in said appellate court; that thereafter and without just cause, and without rendering the services for which he had been paid, plaintiff in error caused the petitioners to be apprehended before the chief justice of the criminal court of Cook county, and being apprehended in open court by the chief justice of the criminal court, claiming that he had never been paid any money whatever for detaining same, he said apprehensions bond, which statement was false and was made with the corrupt and malicious intent to deceive the said chief justice of the criminal court of Cook county in order to induce the said chief justice to incarcerate the petitioners in the county jail, and the chief justice, relying upon said false statement, caused petitioners to be taken into custody and committed to the county jail.

Question 11. (Ill. Rev. Stat., 1935, ch. 10, § 10.)

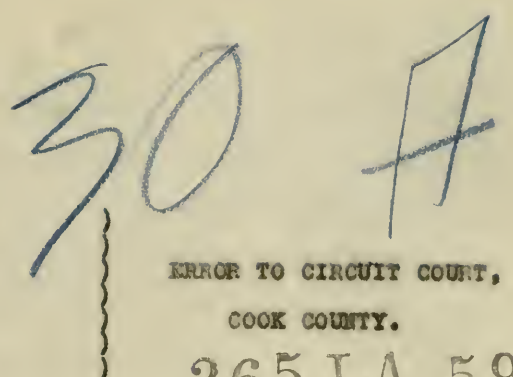
par. 643, provides, " * * * sureties or any of them may, at any time before default upon the bond of recognizance, surrender the principal in their exoneration." There is no claim that any default existed on the bond at the time the petitioners were surrendered and plaintiff in error had the right to surrender the principals in said bond. The fact that he did surrender the principals, even if he had been paid for signing the bond did not constitute contempt. Furthermore, it has repeatedly been said that when the contempt consists of something done or omitted in the presence of the court tending to impede or interrupt its proceedings or lessen its dignity, or out of its presence in disregard or abuse of its process, the proceeding is punitive or criminal, and the penalty is inflicted by way of punishment for the wrongful act and to vindicate the authority and dignity of the people as represented by their judicial tribunals. In such cases the defendant is tried upon his answer, alone. No other evidence may be heard, and if the party shows by his answer under oath, that he is not guilty of the contempt charged his answer is conclusive. If the answer is false the remedy is by indictment for perjury. The answer must be taken as true and if sufficient to purge the party of the contempt he is entitled to be discharged. (People v. McLaughlin, 334 Ill. 354, and cases cited.) The plaintiff in error having by his answer denied the acts charged against him thereby purged himself of the contempt and was entitled to be discharged without further trial.

The order of the Criminal court will be reversed.

REVERSED.

Gridley, P. J., and Scanlan, J., concur.

35356

CORNELIUS LYND, 
Plaintiff in Error,

v.

ROBERT E. KENYON,
Defendant in Error.

ERROR TO CIRCUIT COURT,
COOK COUNTY.

265 I.A. 599²

MR. JUSTICE KERNER DELIVERED THE OPINION OF THE COURT.

This was an action of trespass on the case to recover damages for the alleged fraud and deceit of the defendant in inducing plaintiff to sell to defendant 40 shares of the capital stock of Associated Underwriters, Inc., at \$12.50 a share. The cause was tried before the court and jury and resulted in a verdict and judgment against the plaintiff. To reverse this judgment plaintiff has sued out a writ of error.

Plaintiff's declaration in substance alleged that on July 18, 1927, he was the owner of 40 shares of Associated Underwriters, Inc., a corporation, and the defendant was president, director and executive officer in active charge of the affairs of said corporation; that defendant applied to plaintiff to sell to him the said 40 shares; that said stock was not dealt in upon the open market and the business of the corporation was of such a nature that the value of said stock could not be ascertained from the books of the corporation and the plaintiff was ignorant of the value of said stock and then and there asked what the value of said stock was and the defendant falsely, deceitfully and fraudulently and with the intention and for the purpose of inducing plaintiff to sell the said stock to him, stated to plaintiff the value was \$12.50 a share, which said statement when made by the defendant was false and untrue and was

CONTRIBUTOR, INC.,
Plaintiff in Error,

v.

ROBERT E. KENTON,
Defendant in Error.

2551 A. 339

U. S. DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

This was an action of damages on the case to recover

damages for the alleged fraud and deceit of the defendant in

inducing plaintiff to sell to defendant 40 shares of the capital

stock of Associated Underwriters, Inc., at \$12.50 a share. The

cause was tried before the court and jury and resulted in a verdict

and judgment against the plaintiff. To reverse this judgment

plaintiff has now set a writ of error.

Plaintiff's decision in substance alleged that on

July 18, 1917, he was the owner of 40 shares of Associated Under-

writers, Inc., a corporation, and the defendant was president,

director and executive officer in active charge of the affairs of

said corporation; that defendant negligently induced plaintiff to sell to

him the said 40 shares; that said stock was not dealt in upon the

open market and the business of the corporation was of such a nature

that the value of said stock could not be ascertained from the books

of the corporation and the plaintiff was ignorant of the value of

said stock and then and there asked what the value of said stock was

and the defendant falsely, deceitfully and fraudulently and with the

intention and for the purpose of inducing plaintiff to sell the said

stock to him, stated to plaintiff the value was \$12.50 a share, which

said statement when made by the defendant was false and untrue and was

well-known by the defendant to be false and untrue, in this, the value was greatly in excess of \$12.50 a share and in fact the value was \$181 a share, which fact was well-known to defendant at the time said false representations and statements were made and was unknown to plaintiff; that plaintiff relied upon said false representations and statements of the defendant and believed the same to be true and on the faith thereof did sell and deliver to defendant the said 40 shares of stock and accepted from him in payment thereof \$500, to his damage in the sum of \$10,000. The defendant pleaded the general issue.

Plaintiff's evidence discloses that he is an attorney at law and for some years prior to 1924 was acquainted with the defendant, who was then in the advertising business. In 1924 defendant became interested in the promotion of an insurance association under the name of "Chicago Lloyds" to be written by individual underwriters to be managed by an agency, and "Associated Underwriters, Inc.," (hereinafter called the company) was organized for that purpose in May, 1924. In September or October of 1924, defendant became connected with the company and was made its president. The individuals admitted as underwriters or members of "Chicago Lloyds" each signed a power of attorney, authorizing the company to act as their agent in conducting an insurance business, soliciting insurance, executing policies, collecting premiums, settling and paying claims, etc. By the provisions of the power of attorney they were required to deposit a certain amount of securities with a trust company to secure the performance of the insurance policies so issued, and the payment of losses covered thereby. The power of attorney provided that the company should retain 30 per cent of the gross premiums collected as its compensation for managing the business, the remaining 70 per cent after the payment of losses, to be distributed proportionately among the

well-known by the defendant to be false and untrue, in this, the value was given in excess of \$100,000 a share and in fact the value was \$101 a share, which fact was well-known to defendant at the time said false representations and statements were made and were known to plaintiff; that plaintiff relied upon said false representations and statements of the defendant and believed the same to be true and on the faith thereof did sell and deliver to defendant the said 40 shares of stock and accepted from him in payment thereof \$500,000, to his damage in the sum of \$10,000. The defendant pleaded the general issue.

Plaintiff's evidence disclosed that he is an attorney at law and for some years prior to 1934 was associated with the defendant, who was then in the advertising business. In 1934 defendant became interested in the promotion of an insurance association under the name of "Chicago Lloyd's," to be written by individual underwriters to be managed by an agency, and "Chicago Underwriters, Inc." (hereinafter called the company) was organized for that purpose in May, 1934. In September or October of 1934, defendant became connected with the company and was made its president. The individual admitted as underwriters or members of "Chicago Lloyd's" each signed a power of attorney, authorizing the company to act as their agent in conducting an insurance business, soliciting insurance, issuing policies, collecting premiums, settling and paying claims, etc. By the provisions of the power of attorney they were required to deposit a certain amount of securities with a trust company to secure the performance of the insurance policies as issued, and the payment of losses covered thereby. The power of attorney provided that the company should retain 80 per cent of the gross premiums collected as its compensation for managing the business, the remaining 20 per cent after the payment of losses, to be distributed proportionately among the

individual underwriters as their profits. About this time the plaintiff was consulted, at the instance of one of the underwriters, in regard to the form of the power of attorney. He redrafted the power of attorney and thereafter performed other legal work for the company, and in April, 1925, purchased 50 shares of its capital stock at \$5 a share and became one of its directors as well as a member of the executive committee which directed the general policy of the business they were attempting to build up. The company had an authorized capital of 2,000 no par common shares of which 1653 were taken and held by the defendant and Linus H. Long and one Anderson, each of whom held 551. Anderson was the first president of the company but was succeeded by defendant in October, 1925, and thereafter down to the time of the trial defendant was the president, a director and the active manager of the company and Anderson after his retirement as president was secretary, treasurer and a director until July 8, 1927. These three men, Anderson, Long and defendant, were active in the promotion of the enterprise from its inception until July, 1927. The plaintiff continued as attorney, director and member of the executive committee until January, 1927, and thereafter had no contact whatever either with Chicago Lloyds' or the company and knew nothing about their affairs. When plaintiff first became connected with the company there were practically no underwriters. In July, 1927, there were between two and three hundred, and in the preceding January when plaintiff ceased to be active, there were something less than that number. At the time of the trial the number of underwriters had increased to four hundred and fifty. Up to January, 1927, the company had never paid any dividends and during the first year and a half of its operations, it barely succeeded in covering operating expenses. In the last six months prior to plaintiff's removal from the board,

[illegible]

the business had shown a decided improvement and made a small profit. During 1926 friction developed between defendant and Anderson. Long and Anderson more or less combined together to limit defendant's authority as president and to interfere with the policy that he had been pursuing up to that time and in the spring of 1927 this friction came to a head and culminated on July 8, 1927, when defendant bought out all of Anderson's and Long's stock for \$200,000, \$100,000 to each for his 551 shares, a price of approximately \$181 a share. There is some conflict in the evidence as to the negotiations leading up to this purchase. Long, testifying on behalf of the plaintiff, said that he and Anderson offered to buy defendant's 551 shares for \$100,000, or sell their aggregate of 1102 shares to defendant for \$200,000, and that defendant elected to buy rather than to sell. He further testified that defendant told him that he made the purchase on behalf of a syndicate who were interested in it and by whom it was being financed.

Plaintiff further testified that about July 7 or 8, 1927, he was called by the defendant on the telephone and was told that Long and Anderson were out. Four or five days later the defendant again telephoned him and said he wanted to buy 40 of plaintiff's shares, that he needed the stock, he wanted the stock, and requested the plaintiff to come to his office. Arriving at defendant's office the plaintiff said that he did not know anything about the value at all and asked what was the book value of the stock and defendant replied that Mr. Gore, the accountant of the firm and auditor of their books had not recently written up the books, so that he did not have any figures, to which the plaintiff replied that that would not show much anyway because the value would depend on the value of these contracts - these powers of attorney, which again would depend upon the amount of the business they conducted, and the defendant replied that the price which he had offered, \$500 for the 40 shares, was a

fair one. Plaintiff told him he would think it over. Four or five days later plaintiff called the defendant and told him that he had thought the matter over and was prepared to sell it on "your statement that that is a fair price" and the defendant replied, "that is what it is, I will send you a check." Plaintiff testified further that at that time he knew nothing about the value of the stock or the business of the company, outside of what defendant told him, and that he believed defendant's statement that \$12.50 a share was fair value for the stock, and made no other investigation; that he did not know and defendant had not told him that Anderson and Long had received \$181 a share for their stock.

Defendant testified that from January, 1926, until January, 1927, plaintiff attended meetings of the directors, as well as frequent conferences between directors' meetings, at which statements were presented showing the condition of the business and its earnings. He also testified that he was familiar in a general way with the book value of the stock of the company on July 18, 1927, and estimated it between \$10 and \$12.50 a share, and that there had been no material change in the business between January of 1927, and July of 1927; that his first talk with plaintiff was within a day or two after he had purchased the Anderson and Long stock; that he next talked with him about a week or ten days later and told him he would like to acquire part of his stock; that plaintiff asked him what it was worth and he told him that he did not know, that is "purely a matter of opinion;" that plaintiff's opinion was probably as good as his and the value of the stock was wholly dependent on the future success of the company and plaintiff could probably gauge that as accurately as he could, because he, plaintiff, was more familiar with the company's affairs; that plaintiff asked what was the book value and

fair one. Plaintiff said him he would think it over. Four or five days later Plaintiff called the defendant and told him that he had thought the matter over and was prepared to sell it as "your statement that that is a fair price" and the defendant replied "that is what it is, I will send you a check." Plaintiff testified further that at that time he knew nothing about the value of the stock or the business of the company. Outside of what defendant told him, and that he believed defendant's statement that \$12.50 a share was fair value for the stock, and made no other investigation; that he did not know and defendant had not told him that Anderson and Long had received \$12.50 a share for their stock.

Defendant testified that from January, 1927, until January, 1927, Plaintiff attended meetings of the directors, as well as frequent conferences between directors' meetings, at which statements were presented showing the condition of the business and the earnings. He also testified that he was familiar in a general way with the book value of the stock of the company on July 1st, 1927, and estimated it between \$10 and \$12.50 a share, and that there had been no material change in the business between January of 1927, and July of 1927; that his first talk with Plaintiff was within a day or two after he had purchased the Anderson and Long stock; that he next talked with him about a week or ten days later and told him he would like to acquire part of the stock; that Plaintiff asked him what it was worth and he told him that he did not know, that it was fairly a matter of opinion; that Plaintiff's opinion was probably as good as his and the value of the stock was really dependent on the future success of the company and Plaintiff would probably range from an uncertainty as he could, because he, Plaintiff, was more familiar with the company's situation; that Plaintiff asked what was the book value and

was told defendant did not know but would estimate it somewhere between \$10 and \$15 a share, and that it was then that he told plaintiff he would buy 30 or 40 shares at \$12.50 a share; that four or five days later plaintiff said he would sell 40 shares at \$12.50 a share; that plaintiff did not ask what had been paid Anderson and Long.

Defendant's version relative to the purchase of Long and Anderson's stock was that the matter was presented to him by Long; that Long told him that Anderson had made him an offer of \$100,000 for his stock for the purpose of acquiring control, and that he, Long, suggested to Anderson that in lieu of that they both sell their stock to him for \$200,000; that it involved control of the company for which reason he considered purchasing it irrespective of the price paid; that that proposition was not the alternative of accepting or selling out his holdings to them; that there was no offer made to buy his holdings; that the offer was made by Anderson to buy Long's holdings which would give him control and make the situation worse instead of better; that if Anderson bought Long's holdings he would have control and put himself in as president and put defendant out and leave him a minority stockholder.

Defendant also introduced in evidence a balance sheet of the company from which it appears that during the entire history of the company up to January 1, 1927, it had built up a surplus of \$1667.81; that in the ensuing six months from January 1, 1927, to July 1, 1927, the company earned a net profit of \$24,769.26, which after deducting dividends paid on preferred stock and income tax, left a balance of \$21,892.62, or more than \$11 a share. In other words, it earned more than 200 per cent per share on the original price of the common stock in the first six months of 1927.

It is defendant's contention that his statements were mere

and that defendant did not have any knowledge of the same. Between 1917 and 1918, defendant was in the city of New York for a period of about four or five days. Defendant said he would call on Mr. [redacted] at 11-10 a.m. but did not call. Defendant said he was in New York and was with [redacted] and [redacted].

Defendant's version relative to the purchase of [redacted] and [redacted] stock was that the matter was referred to him by [redacted] that [redacted] told him that [redacted] had made him an offer of \$100,000 for his stock for the purpose of acquiring control. That [redacted] was referred to [redacted] who in turn of that day sent [redacted] their check to him for \$100,000. That it involved control of the company for which reason he considered purchasing it. Interpretive of the facts stated that defendant was not the alternative of accepting or selling all his holdings so that there was no other sale to the [redacted] that the offer was made by [redacted] to [redacted] and [redacted] would give him control and make the situation worse instead of better. That if [redacted] bought [redacted] holdings he would have control and put himself in as president and put defendant out and have him a minority stockholder.

Defendant also introduced in evidence a balance sheet of the company from which it appears that during the entire history of the company up to January 1, 1917, it was built up a surplus of \$100,000. That in the month of January 1, 1917, to July 1, 1917, the company earned a net profit of \$20,000.00, which after deducting dividends paid on preferred stock and interest, left a balance of \$10,000.00. It was then in a surplus. In other words, it would have been in a position to pay out on the original price of the common stock in the first six months of 1917. It is defendant's contention that his statements were made

expressions of opinion; that matters of opinion cannot be held misrepresentations, and the jury should have been given the peremptory instructions offered by him to find for the defendant. There can be no question but that the general rule is that statements as to the value of property, made to induce one to buy or invest money, are treated as expressions of opinion only, and if so intended and understood do not constitute fraud, in the absence of any concealment or misrepresentation of material extrinsic facts (Siewer v. Mueller, 254 Ill. 315, 323; Endsley v. Johns, 120 id. 469), but it cannot be laid down as a matter of law that value is never a material fact (Murray v. Tolman, 162 Ill. 417), and if the statements of value are made by one having superior means of knowledge, not equally available to the other, and he intends them to be, and knows that they are relied upon as a matter of fact and not opinion, they constitute fraud and will be treated as actionable misrepresentations of fact. (Buttitta v. Lawrence, 260 Ill. App. 94, 102, and cases cited.)

In Howell v. Wyatt, 168 Ill. App. 651, 655, it was said:

"Where the vendee is wholly ignorant of the value of the property, and the vendor knows this, and also knows that the vendee is relying upon his (the vendor's) representation as to value, and such representation is not a mere expression of opinion but is made as a statement of fact, which statement the vendor knows to be untrue, such a statement is a representation by which the vendor is bound. * * *

"Where the representations relate to a material fact within the knowledge of the person making them, * * * with respect to which the person to whom the representations are made has not the present opportunity or ability to test or verify, the latter has a right to rely upon such representations, and in the absence of facts apparent to reasonably arouse suspicion and throw doubt upon the truth of the statements, he is not bound to go further and make inquiries in respect thereof."

The evidence in the instant case tended to prove the fraud charged, and presented questions of fact for the determination of the jury and the court did not err in submitting the cause to the jury.

The first point made by plaintiff's counsel upon which a reversal of the judgment is claimed is that the trial court improperly restricted him in his cross examination of the defendant. It appears

from the record that defendant on direct examination testified that he was in effect forced to buy the Anderson and Long stock at any price to protect his interests in the company, and that the \$181 a share paid reflected primarily the value to him of control of the company. To refute this contention plaintiff's counsel sought to bring out on cross examination of the defendant that in fact the defendant acted for a number of others in the purchase of the Anderson and Long stock; that the stock so purchased by him was distributed among defendant and the others participating, and that all or some of them, at least, paid \$181 a share for some of the stock which did not carry control. The court sustained objections to all of the questions by which plaintiff sought to bring such testimony to the attention of the jury and he was not permitted to cross examine the defendant upon these questions. While the rule is that the latitude allowed on cross examination rests very largely in the discretion of the trial court, yet it has repeatedly been held that trial courts should be liberal in the receipt of evidence in the investigation of questions of fraud (Vigas v. O'Bannon, 118 Ill. 334; Strohm v. Hayes, 70 id. 41; Hazleton v. Carolus, 132 Ill. App. 512, 518; Thornton v. Hendrickson, 213 Ill. App. 121, 124), and applying the rules thus announced we are of the opinion the court erred in sustaining the objections of defendant's counsel.

It is also claimed the court erred in excluding evidence by which plaintiff attempted to show that on January 25, 1928, which was the date of the first annual meeting after the sale of plaintiff's stock, the company declared a dividend of \$10 a share. The contention has merit. Whiting v. Price, 172 Mass. 240, was an action in tort for false representations in the sale of a bond; the trial court instructed the jury that they might take into account what has happened since, in order to determine what the value of the bond was and what it is now. There was a judgment in favor of plaintiff and defendant

assigned as error this instruction. The court, speaking through Mr. Justice Holmes, held the jury could take into account subsequent events in arriving at the value of the bond and cited Peck v. Derry, 37 Ch. Div. 541, 593, in which it was held that the jury ought not to be precluded from taking into account the subsequent events.

In Narrow v. Franklin, 289 Mo. 549, the plaintiff was fraudulently induced to buy stock. The evidence was that shortly after the purchase the corporation passed its dividend, and the court said, p. 571: " * * * it does not follow * * * that the subsequent history of the corporation may not throw some light upon the value at the time of purchase, and it is upon this theory that such evidence is competent." Keyerhoff v. Tinslar, 175 Ill. App. 29, (certiorari denied) was an action for deceit in which it was charged defendant induced plaintiff to purchase stock in a corporation. The court said, p. 42: "The evidence of subsequent events was competent to show what the real value of the stock was." (See also Hindman v. First National Bank, 112 Fed. 931, 938; Palmer v. Bratager, 41 So. Dak. 649; Poole v. Camden, 79 W. Va. 310; Klaveness v. Freeze, 33 So. Dak. 263, 273.)

It is next contended that the court erred in instructing the jury. The only instruction given at plaintiff's request related to the measure of damages. Thirteen instructions were given at defendant's request. Objection is made to nine of these instructions. It will not be necessary to discuss all of them. By instruction No. 2 the jury was told that the court will not interfere to avoid the contract where the parties having equal facilities for knowing its value knowingly and deliberately fix upon the price of shares of stock, there being no misrepresentation or concealment of facts, and by instruction No. 3, that the books of the corporation are open to all stockholders alike, and each may inform himself of the

assigned an error this investigation. The court, through Mr. Justice Holmes, held the jury would take into account the amount of stock in existing at the time of the loss and after the loss. 27 C. 217, 218, 219, in which it was held that the jury might not so be precluded from taking into account the subsequent events.

IN WATSON V. WATSON, 100 C. 217, the plaintiff was fraudulently induced to buy stock. The evidence was that shortly after the purchase the corporation passed its dividend, and the court said, p. 218: "It is not to be said that the defendant's history of the corporation and that there were lights upon the value at the time of purchase, and it is upon this theory that such evidence is competent." WATSON V. WATSON, 100 C. 217, 218, 219. (certiorari denied) was an action for deceit in which it was charged defendant induced plaintiff to purchase stock in a corporation. The court said, p. 218: "The evidence of subsequent events was competent to show that the real value of the stock was." (See also WATSON V. FIRST NATIONAL BANK, 117 C. 217, 218, 219; WATSON V. WATSON, 100 C. 217, 218, 219; WATSON V. WATSON, 100 C. 217, 218, 219.)

It is next contended that the court erred in instructing the jury. The only instruction given to plaintiff's request related to the measure of damages. This instruction was given in defendant's request. Objection is made to none of these instructions. It will not be necessary to discuss all of them. By instruction No. 3 the jury was told that the court will not interfere to avoid the contract when the parties having equal facilities for knowing the value knowingly and deliberately fix upon the price of shares of stock, there being no misrepresentation or concealment of facts and by instruction No. 4, that the value of the corporation was open to all stockholders alike, and was not to be determined by the

condition of the company; that the plaintiff had the same opportunity by way of access to the records and books of the company that defendant had; that when the means of information as to the facts and circumstances affecting the value are equally accessible to both parties, and neither of them does anything to impose on the other, the disclosure of any superior knowledge which one party may have over the other is not requisite to the validity of the contract. It was error to give these instructions for several reasons. In our view of the case the question for the determination of the jury was whether defendant had in fact defrauded plaintiff by means of an intentional false representation. By these instructions the jury was told in effect that the failure of the plaintiff to examine the books was an important factor for their consideration. Instructions calling the attention of the jury to particular features in the evidence and telling them that they should give consideration thereto in making up their verdict are improper. These instructions also disregarded plaintiff's evidence that he relied upon defendant's representations. A party cannot escape the legal consequences of his fraudulent conduct on the ground that the fraud might have been discovered had the party deceived exercised reasonable diligence and care. (Linnington v. Strong, 107 Ill. 295; Endsley v. Johns, 120 id. 469; Leonard v. Springer, 197 id. 532.) The fact that the books of the company were open to all stockholders alike, and that each may inform himself of the condition of the company does not relieve a defendant from liability, if false representations are made to induce action by a plaintiff; and he relies and acts thereon to his injury. (Kehl v. Abram, 210 Ill. 218; Carr v. Harnstrom, 207 Ill. App. 31.)

Instruction No. 4 should not have been given. It told the jury that mere matters of opinion or expression of an opinion by the owner of property as to the value of property standing alone should

not be held to be a misrepresentation. It is purely an abstract proposition of law. Trial courts ought not to give mere legal abstractions as instructions to juries but should state the law applicable to the facts of each case, so that the jury may understand the relation of the rules to the evidence. (Mayer v. Springer, 192 Ill. 270.)

Instruction No. 6 told the jury that fraud is never to be presumed; that the law presumes all men to be fair and honest - that their dealings are in good faith, and without intention to disturb, cheat, hinder, delay or defraud others; and if any transaction called in question is equally capable of two constructions - one that is fair and honest, and the other that is dishonest - there the law is, that the transaction questioned is presumed to be honest and fair. This instruction under the evidence was not applicable and should not have been given.

Objection is made to instruction No. 11 which in effect told the jury that the value of the stock was the value of the property as compared with its liabilities. There can be no question that the assets and liabilities of the company should be considered by the jury in arriving at the value of the stock (Johnson v. Niles Invisible Door Check Co., 222 Ill. App. 65), but the jury should also have been so instructed as to permit them to consider the testimony relative to the sale of the Anderson and Long stock at \$181 a share. (Elmore v. Johnson, 143 Ill. 513, 530; Gorham v. Maggillon Iron Co., 284 id. 594, 603.) It was error to give this instruction.

Instruction No. 14 as given to the jury was not applicable to the issues and the facts in the case and should not have been given.

For the reasons stated the judgment is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

Gridley, P. J., and Scanlan, J., concur.

not be held to be a misapprehension. It is merely an incorrect
 proposition of law. That court would not be giving any legal
 instructions as instructions to jurors but would state the law
 applicable in the facts of each case, so that the jury may under-
 stand the relation of the law to the evidence. (Lynch v. Donnelly)

102 Ill. 271.

Instruction No. 8 told the jury that there is never to
 be presumed; that the law presumes all men to be fair and honest -
 that their dealings are in good faith, and without intention to
 deceive, cheat, swindle, defraud or injure others; and if any trans-
 action called in question is equally capable of two constructions -
 one that is fair and honest, and the other that is dishonest - there
 the law is, that the transaction is presumed to be honest
 and fair. This instruction under the evidence was not applicable
 and should not have been given.

Objection is made to Instruction No. 11 which in effect

told the jury that the value of the stock was the value of the
 property as compared with the liabilities. There can be no question
 that the assets and liabilities of the company should be considered
 by the jury in arriving at the value of the stock (Johnson v. Shaw
 104 Ill. 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000).

Instruction No. 12 as given to the jury was not applicable
 to the issues and the facts in the case and should not have been given.
 For the reasons stated the judgment is reversed and the
 case remanded for a new trial.

35373

CHARLES J. WEBER,
(complainant),
Appellee,

v.

DAVID E. COHN and
CHICAGO GEAR MANUFACTURING
CO., a corporation,
(defendants),
Appellants.

317
APPEAL FROM SUPERIOR
COURT, COOK COUNTY.

265 I.A. 599³

MR. JUSTICE KERDER DELIVERED THE OPINION OF THE COURT.

The complainant, Charles J. Weber, filed a bill against the defendants, David E. Cohn and Chicago Gear Manufacturing Co., for an accounting and seeking to have the issue of certain capital stock of the Chicago Gear Manufacturing Co., declared invalid and illegal. After issues joined the cause was referred to a master to take testimony and report his conclusions of law and fact. The master filed his report, in which he recommended a decree be entered in accordance with the prayer of the bill. Objections to the report were ordered to stand as exceptions. There was a hearing on the exceptions, which were overruled, and the court entered the decree appealed from.

From the evidence it appears that early in the fall of 1913, after complainant had informed David E. Cohn (hereafter referred to as the defendant) that he intended to go into the gear manufacturing business, defendant requested complainant to take him into the business, it was agreed between them that they would engage in that business as equal partners; that on November 6, 1913, they called to see Herman Waldman, an attorney, and informed him of their plans to form such a partnership; that he told them it would be advisable to form a corporation instead; that they thereupon

25273

CHARLES J. ROBER,
(complainant),
Appellee,

v.

DAVID E. COHN and
CHICAGO GEAR MANUFACTURING
CO., a corporation,
(defendants),
Appellants.

APPEAL FROM DECISION
COURT, COOK COUNTY.

25273

MR. JUSTICE DELIVERED THE OPINION OF THE COURT.

The complainant, Charles J. Rober, filed a bill against the defendants, David E. Cohn and Chicago Gear Manufacturing Co., for an accounting and seeking to have the issue of certain capital stock of the Chicago Gear Manufacturing Co., declared invalid and illegal. After issues joined the cause was referred to a master to take testimony and report his conclusions of law and fact. The master filed his report, in which he recommended a decree be entered in accordance with the prayer of the bill. Objections to the report were ordered to stand as exceptions. There was a hearing on the exceptions, which were overruled, and the court entered the decree appealed from.

From the evidence it appears that early in the fall of 1913, after complainant had informed David E. Cohn (hereafter referred to as the defendant) that he intended to go into the gear manufacturing business, defendant requested complainant to take him into the business, it was agreed between them that they would engage in that business on equal partners; that on November 4, 1913, they called to see Herman Sigman, an attorney, and informed him of their plans to form such a partnership; that he told them it would be advisable to form a corporation instead; that they thereupon

directed him to prepare an application for the incorporation of the Chicago Gear Manufacturing Co., (hereinafter referred to as the company) in which each was to own one-half of the stock; that such an application was drawn, in which it was recited that each subscribed for forty-nine shares at \$100 a share. The evidence further discloses that both complainant and defendant told Waldman that all dividends to be declared by the company were to be divided equally between them; that after the formation of the company all dividends declared and paid by the company were, in fact, divided equally between the parties.

The proofs further show that up to August 15, 1914, no certificates of stock of any kind had been issued by the company, but the books of account showed that complainant paid \$1,100 and defendant paid \$3,600 into the treasury, these sums being the only money paid by them at any time in payment of any stock issued by the company; that July 14, 1914, a special meeting of the stockholders of the company was held, at which were present complainant and defendants, each as the owner of forty-nine shares and Herman Waldman as the owner of two shares; that a resolution was adopted, all the votes represented by the whole stock voting in favor of increasing the capital stock of the company from \$10,000 to \$30,000, and on July 23, 1914, a certificate of such increase was filed in the office of the secretary of state of the State of Illinois; that on August 15, 1914, a certificate for two shares of the capital stock of the company was issued to Herman Waldman in payment for his services rendered to the company; that thereafter, between November 1, 1914, and March 31, 1915, certificates of stock were issued by the company, signed by complainant and defendant as officers of the company, and at the date of the filing of the bill fifty-one shares were in existence in the name of complainant, and ninety-seven shares in the

directed him to prepare an application for the registration of the Chicago Great Western Railway Co., (hereinafter referred to as the company) in which each was to own one-half of the stock; that such an application was drawn, in which it was recited that each subscribed for forty-nine shares at \$100 a share. The witness further advised that both complainant and defendant said Waldman that all dividends to be declared by the company were to be divided equally between them; that after the formation of the company all dividends declared and paid by the company were, in fact, divided equally between the parties.

The proofs further show that up to August 12, 1914, no certificates of stock of any kind had been issued by the company, but the books of account showed that complainant paid \$1,100 and defendant paid \$3,600 into the treasury, there also being the only money paid by them at any time in payment of any stock issued by the company; that July 12, 1914, a special meeting of the stockholders of the company was held, at which were present complainant and defendant, each as the owner of forty-nine shares and Herman Waldman as the owner of two shares; that a resolution was adopted, all the votes represented by the said stock voting in favor of increasing the capital stock of the company from \$1,000 to \$50,000, and on July 23, 1914, a certificate of such increase was filed in the office of the secretary of state of the State of Illinois; that on August 12, 1914, a certificate for two shares of the capital stock of the company was issued to Herman Waldman in payment for his services rendered to the company; that thereafter, between November 1, 1914, and March 11, 1915, certificates of stock were issued by the company, signed by complainant and defendant as officers of the company, and as the date of the filing of the bill fifty-one shares were in existence in the name of complainant, and ninety-seven shares in the

name of defendant.

The evidence further discloses that from the income tax return by the company, signed and sworn to by defendant, for the years 1924, 1925, 1926 and 1927, it appears that all the stock of the company was owned by complainant and defendant equally; that in May, 1929, the parties together consulted H. V. McGurran, an attorney, relative to the capital stock record of the company and after such consultation he wrote, under date of May 22, 1929, a letter addressed to each of the parties, in which he said: "If, as you stated to me, the original investment on the part of Cohn was \$3,600.00 and on the part of Weber \$1,100.00, and there was no other capital invested by either of you, and the profits were to be divided equally between you, I can see no reason why the capital stock was issued in the proportion indicated."

It further appears from the testimony of the defendant that in 1913, complainant did state to him that "he was going into the gear business and asked me to go in with him. * * * I stated: 'Charlie, if we are going into any business together, I am going to be at the head of this company, and I am going to own the majority of stock.' * * * I said the dividends would be divided equally." On cross-examination he admitted the dividends were declared and paid in equal amounts.

By the decree the chancellor substantially found inter alia that in 1913 the complainant and defendant agreed to engage in the business of manufacturing gears; that a corporation would be formed, of which they would be equal owners, and share equally in the dividends and profits, and adjudged and decreed that the increase of the capital stock was illegal and void and all shares issued in excess of one hundred shares were decreed void and cancelled; that complainant was entitled with defendant to an equal

name of defendant.

The evidence further discloses that from the income tax return of the company, shown and sworn to by defendant, for the years 1931, 1932, 1933 and 1934, it appears that all the stock of the company was owned by complainant and defendant equally; that in May, 1933, the parties together consulted E. V. McWhorter, an attorney, relative to the capital stock record of the company and after such consultation he wrote, under date of May 23, 1933, a letter addressed to each of the parties, in which he said: "If, as you stated to me, the original investment on the part of Com was \$2,000.00 and on the part of Defor \$1,100.00, and there was no other capital invested by either of you, and the profits were to be divided equally between you, I can see no reason why the capital stock was issued in the proportion indicated."

It further appears from the testimony of the defendant that in 1913, complainant did state to him that "he was going into the gas business and asked me to go in with him." * * * I stated: "Certainly, if we are going into any business together, I am going to be at the head of this company, and I am going to own the majority of stock." * * * I said the dividends would be divided equally." On cross-examination he admitted the dividends were declared and paid in equal amounts.

By the above the complainant substantially found that also that in 1913 the complainant and defendant agreed to engage in the business of manufacturing gas; that a corporation would be formed, of which they would be equal owners, and which equally in the dividends and profits, and adjudged and decreed that the issuance of the capital stock was illegal and void and all shares issued in excess of one hundred shares were declared void and annulled; that complainant was entitled with defendant to an equal

interest in all the stock and other property owned by the company and was entitled to an accounting on a basis of equal interest in all assets of the company, in which accounting credit should be given for all moneys paid by either party and referred the cause to a master in chancery to state an account between the parties showing the items claimed, admitted and allowed, and report his conclusions.

The main contention of the defendant is that complainant has failed to establish an agreement that the stock and property owned by the company were to be divided between the complainant and the defendant equally. After an examination of all the evidence, we are of the opinion that the evidence justifies the findings of the chancellor that the parties agreed to form a corporation to engage in the business of manufacturing gears, the profits of which they were to share equally.

It is next contended that complainant is barred by laches from claiming he is entitled to an equal division of the stock, and in arguing for a reversal defendants' counsel say that for approximately fifteen years complainant had knowledge of the fact that defendant claimed to be a majority stockholder; in other words, the entire argument in support of the contention is lapse of time. The doctrine of laches was not created to protect fraud and iniquity, but to promote the natural principle of justice and it will not be applied unless there are conditions other than mere lapse of time. It is a question of equity or inequity, of justice or injustice. (Brissell v. Knapp, 155 Fed. 809, 810.) Lapse of time, alone, is not sufficient. (Reynolds v. Sumner, 126 Ill. 58.) Where the obligation is clear and its essential character has not been changed by lapse of time, equity will enforce a claim of long standing as readily as one of recent origin as between the immediate parties to the transaction. (Thorndike v. Thorndike, 142 Ill. 450.) Where there is nothing to

interest in all the stock and other property owned by the company and was entitled to an accounting on a basis of equal interest in all assets of the company, in which accounting credit should be given for all moneys paid by either party and referred the cause to a master in chancery to settle an account between the parties showing the items claimed, admitted and allowed, and report his conclusions.

The main contention of the defendant is that complainant has failed to establish an agreement that the stock and property owned by the company were to be divided between the complainant and the defendant equally. For an examination of all the evidence, we are of the opinion that the evidence justifies the findings of the chancellor that the parties agreed to form a corporation to engage in the business of manufacturing gears, the profits of which they were to share equally.

It is not contended that complainant is barred by laches from claiming he is entitled to an equal division of the stock, and in arguing for a reversal of the chancellor's decree say that for approximately fifteen years complainant had knowledge of the fact that defendant claimed to be a majority stockholder; in other words, the entire argument in support of the contention is laches of time. The doctrine of laches was not created to protect fraud and inequity, but to promote the natural principle of justice and it will not be applied unless there are conditions other than mere lapse of time. It is a question of equity or inequity, of justice or injustice. (Ex parte V. Knappe, 105 Fed. 807, 810.) Lapse of time, alone, is not sufficient. (Reynolds v. Walker, 100 Ill. 38.) Where the obligation is clear and its essential character has not been changed by lapse of time, equity will enforce a claim of law standing as readily as one of recent origin as between the immediate parties to the transaction. (Thornbake v. Thornbake, 142 Ill. 430.) Where there is nothing to

show that the defendant has been misled by the delay to his injury, or in any way placed in a worse position by a failure to file the bill at an earlier date, there is no laches. (Turpin v. Dennis, 139 Ill. 274.) In considering the question of laches, courts indulge great leniency when the delay is due to the intimate personal relations existing between the parties and the confidence reposed in one by another. (Luytens v. Ahlrich, 308 Ill. 11, 21.)

In Schultz v. O'Hearn, 319 Ill. 244, 247, it was said:

"There is no absolute rule as to what constitutes laches. - it must be determined from the facts of each particular case. Unreasonable delay in asserting a right, with knowledge of the facts, by reason of which the person against whom the right is claimed has incurred expense or obligation or changed his position to his detriment, is ordinarily sufficient reason for equity to refuse its aid to establish an asserted right. Where, however, there is no knowledge of the wrong done or refusal to ascertain facts there is no laches. A confessed wrongdoer, who has not been misled, deceived or harmed by the delay of the person injured in asserting his legal remedies, has no cause of complaint that he was not sooner called to account for his wrongdoing."

The bill in the instant case was filed July 13, 1929.

It is admitted that all dividends declared by the company were paid equally to the parties and that as late as May, 1929, the parties consulted an attorney relative to the capital stock of the company, and it was clearly proven that the profits were to be divided equally between the parties. It, is, therefore, apparent that the parties are in exactly the same position now that they were at the time they entered into their agreement to be equal owners of the assets of the company and of all its profits. Furthermore, it appears from the evidence that the relationship existing between the parties was intimate and the equitable rights of the complainant as the owner of one-half of the assets of the company were acknowledged, and his trust and confidence in defendant not abused until after the consultation in McGurran's office in May, 1929, and the conditions have not changed as to make enforcement of complainant's rights inequitable. Under this state of the record, we are of the opinion that it cannot be

show that the defendant has been misled by the delay to his injury.

or in any way placed in a worse position by a failure to file the

bill at an earlier date, there is no reason. (Virginia v. Virginia)

129 Ill. 344. In considering the question of judgment, courts

indulge great leniency when the delay is due to the intimate personal

relations existing between the parties and the confidence reposed in

one by another. (Virginia v. Virginia, 129 Ill. 344.)

In Virginia v. Virginia, 129 Ill. 344, 237, it was held:

"There is no absolute rule as to what constitutes
laches. - It must be determined from the facts of each particular
case. Unreasonable delay in asserting a right, with knowledge
of the facts, by reason of which the person against whom the
right is claimed has incurred expense or obligation or changed
his position to his detriment, is ordinarily sufficient reason
for equity to refuse him the aid of a judicial remedy. But
where, however, there is no knowledge of the wrong done or refusal
to assert the fact there is no laches. A confessed wrong, or, who
has not been misled, deceived or harmed by the delay of the person
injured in asserting his legal remedy, has no cause of complaint
that he was not sooner called to account for his wrongdoing."

The bill in the instant case was filed July 15, 1935.

It is admitted that all dividends declared by the company were paid

equally to the parties and that as late as May, 1935, the parties

consulted an attorney relative to the capital stock of the company,

and it was clearly proven that the profits were to be divided equally

between the parties. It is, therefore, apparent that the parties

are in exactly the same position now that they were at the time they

entered into their agreement to be equal owners of the assets of the

company and of all its profits. Furthermore, it appears from the

evidence that the relationship existing between the parties was intimate

and the equal rights of the complainant as the owner of one-half

of the assets of the company were acknowledged, and his trust and

confidence in defendant not shaken until after the cancellation in

defendant's office in May, 1935, and the conditions have not changed

as to the enforcement of complainant's rights in this case. Under

this state of the record, we are of the opinion that it cannot be

said that complainant's claim is barred by laches. (Reynolds v. Sumner, 126 Ill. 58, 72.)

It is next claimed complainant is not entitled to an accounting. The bill alleges, and the record discloses, that the defendant was experienced in office management and had supervision and charge of the bookkeeper and his work and that complainant was a practical engineer and unfamiliar with business details; that defendant had entered upon the books of the company incorrect items to the detriment of the complainant as a stockholder of the company; that during the hearing, while complainant was endeavoring to prove these various items, it was stipulated that there was due and owing from defendant to the company \$20,439.53, and that there was due from complainant to the company \$5,710.30. The contention, as we understand it, is that because it appears that complainant is indebted to the company he does not come into equity with clean hands. There is no merit in this contention. Indeed, it has not been seriously urged here. There is not a scintilla of evidence and no claim is made that complainant has been guilty of any fraud, and the mere fact that he admits that he is indebted to the company, is no evidence that he does not come into equity with clean hands.

Equally without merit is the claim of the defendant that the court erred in proceeding with the trial of the case before it had acquired jurisdiction over a necessary party. It appears that on October 29, 1929, complainant filed his supplemental bill, in which it was alleged that on July 16, 1929 (after the filing of the original bill of complaint), the defendant purported to transfer and assign to Mary Cohn six shares of the capital stock of the company and that a certificate for said six shares was issued to her, signed only by the defendant as president and treasurer of the company; that said certificate was not executed as provided for by the by-laws of the

said that complainant's claim is barred by laches. (Exhibit A, page 101, 102, 103.)

It is next claimed that complainant is not entitled to an accounting. The bill alleges, and the record discloses, that the defendant was experienced in office management and had supervision and charge of the bookkeeper and his work and that complainant was a practical business man familiar with business details. That defendant had control over the books of the company inasmuch as he was the owner of the business and a stockholder of the company; that during the hearing, while complainant was endeavoring to prove these various issues, it was admitted that there was one and only one defendant in the company, and that there was one from complainant in the company, \$5,000.00. The contention, as we understand it, is that defendant is a party to complainant's interest in the company, he does not come into equity with clean hands. There is no merit in this contention. Indeed, it has not been shown that there is not a wealth of evidence and no claim is made that complainant has been guilty of any fraud, and the mere fact that he admits that he is indebted to the company, is no evidence that he does not come into equity with clean hands. It is also without merit in the claim of the defendant that the court erred in proceeding with the trial of the case before it had admitted jurisdiction over a necessary party. It appears that on October 20, 1929, complainant filed his supplemental bill, in which it was alleged that on July 15, 1929, before the filing of the original bill of complaint, the defendant purposed to transfer and assign to Mary John all shares of the capital stock of the company and that a certificate for said stock was issued to her, signed only by the defendant as president and treasurer of the company; that said certificate was not entered as provided for by the by-laws of the

company and complainant prayed that Mary Cohn be made a party defendant and that it be decreed that said certificate be delivered up and cancelled. Mary Cohn was never served with summons and on November 23, 1929, upon complainant's motion, the supplemental bill was dismissed.

After considering the entire record and the remaining arguments of counsel, we are of the opinion that the decree of the Superior court should be affirmed and it is so ordered.

AFFIRMED.

Gridley, P. J., and Scanlan, J., concur.

company and complaint prayed that Mary Conn be made a party defendant and that it be ordered that said certificate be delivered up and cancelled. Mary Conn was never served with summons and on November 22, 1929, upon complainant's motion, the supplemental bill was dismissed.

After considering the entire record and the remaining arguments of counsel, we are of the opinion that the decree of the superior court should be affirmed and it is so ordered.

ATTEST.

Gridley, P. J., and Connelley, J., concur.

35385

FRED WHALEY,
(plaintiff),
Defendant in Error,

v.

FELIX RUCKER, doing business
as THE ROYAL CAB COMPANY,
(defendant),
Plaintiff in Error.

337
ERROR TO SUPERIOR
COURT, COOK COUNTY.

265 I.A. 599⁴

MR. JUSTICE KERNER DELIVERED THE OPINION OF THE COURT.

Plaintiff, Fred Whaley, recovered a judgment on the verdict of the jury, against the defendant, Felix Rucker, doing business as The Royal Cab Company, for \$2000 because of injuries to his person received while a passenger in the taxicab of the defendant. To reverse this judgment defendant has sued out a writ of error.

The plaintiff's declaration consists of three counts. Each alleges that on October 26, 1929, the defendant owned, operated, possessed and controlled a certain automobile, called a taxicab, which was used in the carrying on of his business as a carrier of passengers for hire in the City of Chicago, Illinois; that on that date plaintiff was a passenger in said taxicab for hire. The first count charges negligence generally in the management and operation of the taxicab in which the plaintiff was riding as a passenger. The second count charges that the defendant failed to equip his taxicab with good and sufficient brakes and that it was operated at a high, dangerous and excessive speed, to-wit, forty-five miles an hour. The third count charges the existence of paragraph 22, chapter 95 of the Revised Statutes of Illinois, and that in violation

32322

THAT THE
(Plaintiff)
Defendant in Error

IN THE
COURT OF THE
COUNTY OF

2021 A. 599

THE COURT
as the
(Defendant)
Plaintiff in Error

THE COURT ORDERED THE OFFICE OF THE CLERK

Plaintiff, Fred J. Kelly, recovered a judgment on the
verdict of the jury, against the defendant, John J. Kelly, dated
October 10, 1920, for \$1000 because of injuries
to his person received while a passenger in the taxicab of the
defendant. To reverse this judgment defendant has sued out a
writ of error.

The plaintiff's declaration contains of three counts.
The first alleges that on October 10, 1920, the defendant owned, operated,
possessed and controlled a certain automobile, called a taxicab,
which was used in the carrying on of his business as a carrier of
passengers for hire in the City of Chicago, Illinois; that on that
date plaintiff was a passenger in said taxicab for hire. The first
count charges negligence, fault, in the management and operation
of the taxicab in which the plaintiff was riding as a passenger.
The second count charges that the defendant failed to equip his
taxicab with good and sufficient brakes and that it was operated
at a high, dangerous and excessive speed, to-wit, forty-five miles
an hour. The third count charges the existence of paragraph 12,
chapter 20 of the Revised Statutes of Illinois, and that in violation

of the statute the defendant ran said taxicab at an unreasonable rate of speed, to-wit, fifty miles an hour. Each count alleges that the plaintiff was at all times in the exercise of ordinary care for his own safety. The defendant filed a plea of general issue and a special plea of non-ownership and operation.

The evidence on behalf of the plaintiff consisting of the testimony of the plaintiff and John LaBore, Earl Baker and Dr. W. B. Fisk, discloses that plaintiff was a reporter on a Chicago newspaper, earning \$35 a week, and was assigned to report a football game to be played at Soldiers Field, located on the shore of Lake Michigan east of Michigan avenue in Chicago, and at about 1 p. m., October 26, 1929, he left his home at 31st street and Ellis avenue, with John LaBore and Earl Baker, that they entered defendant's taxicab and plaintiff directed him to proceed to the stadium. The cab proceeded west on 31st street to the outer drive, and then north on the outer drive at about thirty miles an hour; that plaintiff told defendant not to drive so fast and defendant replied that he had to "hurry back. * * * this is a busy day," and drove faster, passing everybody, and when north of 22nd street, going about forty miles an hour, he struck a post overturning the cab and plaintiff was thrown to the ground. He was taken to St. Luke's hospital. His left arm had a fracture of the left humerus, and also fractures in both the small bones of the forearm. He remained in the hospital until December 2, 1929, his hospital bill was \$193; that he suffered great pain and did not return to work until March, 1930; that his left arm after the injury was shorter than his right and that this condition is permanent.

The only evidence offered in defendant's behalf was a written statement made by plaintiff and the written statements of John LaBore and Earl Baker. LaBore in his statement said: "We

[illegible]

The evidence on behalf of the plaintiff will show that

The first my of the pl in the John Labaree, 1907

1. The first step is to identify the problem or question that needs to be answered.

Chicago, September 10, 1900.

1. The first of these is the fact that the majority of the population of the United States is now living in urban areas. This is a result of the process of urbanization, which has been going on since the beginning of the 20th century. The population of the United States has increased from about 100 million in 1900 to over 200 million in 1960. At the same time, the population of rural areas has decreased from about 100 million in 1900 to about 50 million in 1960. This has led to a concentration of the population in urban areas, which has had a number of important consequences for the development of the United States.

of Lake Michigan east of Michigan Avenue in Chicago, and is about

1 p.m., October 24, 1951, he left his home at 21st Street and 11th

avenue, with John. In one of the "Kew" that they entered behind-

...and the fact that the ...

and was proceeded to the order drive, and then

North on the other side of the river, there is a small village.

Janis Beliger Submitted her dog's v. copy of her submitted files this

no had to "hurry back." "This is a busy day," and drove faster

ret Jacob Bailey, Jacob, born to Mrs. and Dr. Theodore Bailey, son

After an hour, he showed a good understanding of the case and plaintiff.

and shown to the friends.

It was not a coincidence that the 1970s were the decade of the "New Wave" in film, and the 1970s were the decade of the "New Wave" in film.

with the small case of the 10-11-12-13-14-15-16-17-18-19-20-21-22-23-24-25-26-27-28-29-30-31-32-33-34-35-36-37-38-39-40-41-42-43-44-45-46-47-48-49-50-51-52-53-54-55-56-57-58-59-60-61-62-63-64-65-66-67-68-69-70-71-72-73-74-75-76-77-78-79-80-81-82-83-84-85-86-87-88-89-90-91-92-93-94-95-96-97-98-99-100-101-102-103-104-105-106-107-108-109-110-111-112-113-114-115-116-117-118-119-120-121-122-123-124-125-126-127-128-129-130-131-132-133-134-135-136-137-138-139-140-141-142-143-144-145-146-147-148-149-150-151-152-153-154-155-156-157-158-159-160-161-162-163-164-165-166-167-168-169-170-171-172-173-174-175-176-177-178-179-180-181-182-183-184-185-186-187-188-189-190-191-192-193-194-195-196-197-198-199-200-201-202-203-204-205-206-207-208-209-210-211-212-213-214-215-216-217-218-219-220-221-222-223-224-225-226-227-228-229-230-231-232-233-234-235-236-237-238-239-240-241-242-243-244-245-246-247-248-249-250-251-252-253-254-255-256-257-258-259-260-261-262-263-264-265-266-267-268-269-270-271-272-273-274-275-276-277-278-279-280-281-282-283-284-285-286-287-288-289-290-291-292-293-294-295-296-297-298-299-300-301-302-303-304-305-306-307-308-309-310-311-312-313-314-315-316-317-318-319-320-321-322-323-324-325-326-327-328-329-330-331-332-333-334-335-336-337-338-339-340-341-342-343-344-345-346-347-348-349-350-351-352-353-354-355-356-357-358-359-360-361-362-363-364-365-366-367-368-369-370-371-372-373-374-375-376-377-378-379-380-381-382-383-384-385-386-387-388-389-390-391-392-393-394-395-396-397-398-399-400-401-402-403-404-405-406-407-408-409-410-411-412-413-414-415-416-417-418-419-420-421-422-423-424-425-426-427-428-429-430-431-432-433-434-435-436-437-438-439-440-441-442-443-444-445-446-447-448-449-450-451-452-453-454-455-456-457-458-459-460-461-462-463-464-465-466-467-468-469-470-471-472-473-474-475-476-477-478-479-480-481-482-483-484-485-486-487-488-489-490-491-492-493-494-495-496-497-498-499-500-501-502-503-504-505-506-507-508-509-510-511-512-513-514-515-516-517-518-519-520-521-522-523-524-525-526-527-528-529-530-531-532-533-534-535-536-537-538-539-540-541-542-543-544-545-546-547-548-549-550-551-552-553-554-555-556-557-558-559-560-561-562-563-564-565-566-567-568-569-570-571-572-573-574-575-576-577-578-579-580-581-582-583-584-585-586-587-588-589-590-591-592-593-594-595-596-597-598-599-600-601-602-603-604-605-606-607-608-609-610-611-612-613-614-615-616-617-618-619-620-621-622-623-624-625-626-627-628-629-630-631-632-633-634-635-636-637-638-639-640-641-642-643-644-645-646-647-648-649-650-651-652-653-654-655-656-657-658-659-660-661-662-663-664-665-666-667-668-669-670-671-672-673-674-675-676-677-678-679-680-681-682-683-684-685-686-687-688-689-690-691-692-693-694-695-696-697-698-699-700-701-702-703-704-705-706-707-708-709-710-711-712-713-714-715-716-717-718-719-720-721-722-723-724-725-726-727-728-729-730-731-732-733-734-735-736-737-738-739-740-741-742-743-744-745-746-747-748-749-750-751-752-753-754-755-756-757-758-759-760-761-762-763-764-765-766-767-768-769-770-771-772-773-774-775-776-777-778-779-780-781-782-783-784-785-786-787-788-789-790-791-792-793-794-795-796-797-798-799-800-801-802-803-804-805-806-807-808-809-810-811-812-813-814-815-816-817-818-819-820-821-822-823-824-825-826-827-828-829-830-831-832-833-834-835-836-837-838-839-840-841-842-843-844-845-846-847-848-849-850-851-852-853-854-855-856-857-858-859-860-861-862-863-864-865-866-867-868-869-870-871-872-873-874-875-876-877-878-879-880-881-882-883-884-885-886-887-888-889-890-891-892-893-894-895-896-897-898-899-900-901-902-903-904-905-906-907-908-909-910-911-912-913-914-915-916-917-918-919-920-921-922-923-924-925-926-927-928-929-930-931-932-933-934-935-936-937-938-939-940-941-942-943-944-945-946-947-948-949-950-951-952-953-954-955-956-957-958-959-960-961-962-963-964-965-966-967-968-969-970-971-972-973-974-975-976-977-978-979-980-981-982-983-984-985-986-987-988-989-990-991-992-993-994-995-996-997-998-999-1000-1001-1002-1003-1004-1005-1006-1007-1008-1009-1010-1011-1012-1013-1014-1015-1016-1017-1018-1019-1020-1021-1022-1023-1024-1025-1026-1027-1028-1029-1030-1031-1032-1033-1034-1035-1036-1037-1038-1039-1040-1041-1042-10

THE UNIVERSITY OF CHICAGO PRESS

ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED

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- 8 -

THE UNIVERSITY OF CHICAGO

ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED

were traveling about 30 miles an hour on outer drive about block and a half from Stadium when an out of town car from Wisconsin made a left turn just in front of our cab which was moving in the same direction as we were traveling and our driver tried to avoid the accident when he was forced into the post. * * * I am satisfied and convinced the accident was no fault of Rucker and the Royal Cab but solely the fault of the Wisconsin car * * *." Beneath this statement is the following: "The above is my statement only differ in our driver's speed. I believe he was going too fast. * * * (signed) Fred Whaley."

Baker in his statement said: "We were making 40 miles per hour. All I can remember was that about half square from Stadium when my uncle said look at that dizzy fellow and all a sudden our cab made a swerve to the left attempting to dodge. The cab in which I was riding then ran into the post, * * *. Although our cab was moving at a rapid speed I am convinced if the Wisconsin car did not force us or was driving properly we would have suffered the accident and injury we did and I mean to stand by Rucker and the Royal Cab and Royal Cab Insurance Co. in recovering from the Wisconsin car owner which caused the accident for my injury and I therefore release Royal Cab Co. and surety."

Upon cross-examination plaintiff testified: "I signed the statement; I signed everything they told me to sign without reading it; I never read that statement. I did not see any automobile with a Wisconsin license plate." LaBore, on cross-examination, identified his signature to the statement but denied an out of town car from Wisconsin made a left turn just in front of defendant's cab. Baker, who is plaintiff's nephew, on cross-examination testified some gentleman came to his home and said, "Will you sign a complaint for Fred Whaley," and I said, "Yes, I will sign one. I didn't read the

our driver's report. I believe he was being too frank. * * * (signed)

[illegible]

Upon cross-examination, Mitchell testified: "I signed the statement I signed yesterday and told me to sign without reading it; I never read that statement. I did not see any fingerprints with a latent latent print. I don't, on cross-examination, identified his signature to the statement but denied an act of torn out from a statement made a few days past in view of statement's copy. Baker, who is Mitchell's nephew, on cross-examination testified that statement made to his father was said, 'Will you sign a complaint for your nephew', and I said, 'Yes, I will sign one. I didn't read the

paper." He further testified he saw no Wisconsin car.

The defendant contends that the judgment should be reversed because (1) the evidence did not support the verdict; (2) error in instructions, and (3) that an insurance company was mentioned in the trial of the cause.

We are of the opinion that the plaintiff at the time of the accident was in the exercise of ordinary care for his own safety; that there was sufficient evidence in the record upon which to base the verdict of the jury and we would not be warranted in disturbing their verdict on the ground that it was against the weight of the evidence.

Defendant's next contention is that instructions numbers 1, 2, 3 and 4 should not have been given. Instruction number 1 is the identical instruction which has been held erroneous in Stansfield v. Wood, 231 Ill. App. 586; Stamas v. Waskow, 250 Ill. App. 364, and Riddle v. Mansager, 254 Ill. App. 68. All of these cases were not, however, reversed because of this instruction. In the Stansfield case, supra, at page 592, it was said:

"It is not every error, however, which will justify a reversal. To justify a reversal on account of error, it must appear from the record that upon another trial, if the same error does not intervene, a different result might be expected so that the error would deprive the defendant of some substantial legal right. Where it can be said from the record that the error assigned could not reasonably affect the result of the trial, the judgment of the trial court should be affirmed. (People v. Heard, 305 Ill. 319; People v. Weir, 295 Ill. 263.)

The erroneous instruction in question did not go to the merits of the entire case but only had a bearing upon whether or not appellant was guilty of negligence under the third count of the declaration by reason of a violation of section 22 of the Motor Vehicle Act (Cahill's Ill. St. ch. 95a, par. 23) and in no way affected the issue under the first count of the declaration which charged negligence in the driving and operation of the automobile."

In the instant case, also, the instruction did not go to the merits of the entire case but only had a bearing upon whether or not defendant was guilty of negligence under the second and third counts of the declaration ^{and} in no way affected the issue under the

paper." He further testified that he was not instructed to
The defendant contends that the testimony should be
reversed because (1) the evidence did not support the verdict;
(2) error in instructions, and (3) that an insurance company was
mentioned in the bill of particulars.
We are of the opinion that the plaintiff at the time of
the accident was in the exercise of ordinary care for his own safety;
that there was sufficient evidence in the record upon which to base
the verdict of the jury and we would not be warranted in disturbing
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Smith, 231 Ill. App. 2d 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 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first count of the declaration which charged negligence in the driving and operation of the automobile. Furthermore, the negligence of the defendant is so conclusive and so clearly established that the giving of the instruction complained of could not have misled the jury to a wrong conclusion upon the facts (Leideck v. City of Chicago, 248 Ill. App. 545), and there is no claim that the amount of the judgment was excessive.

Instruction number 3 informed the jury that if they believed from the evidence that the plaintiff has made out his case by a preponderance of the evidence as laid out in his declaration or some count thereof, then the jury should find for the plaintiff, and if they further believe the plaintiff has sustained injuries on account of the negligence of the defendant, as set forth and claimed in his declaration, or some count thereof, then the measure of his recovery is such damages as will compensate him for such injuries, etc.

The rule is that an instruction directing a verdict for the plaintiff, if the jury believe he has proved his case by a preponderance of the evidence as laid in his declaration can only be justified when the declaration contains a complete statement of the cause of action (Krieger v. A. E. & C. R. R. Co., 242 Ill. 544; I. C. R. R. Co. v. Smith, 208 id. 608; Cromer v. Borders Coal Co., 246 id. 455; Cantwell v. Harding, 249 id. 354, 358; Terra Cotta Lumber Co. v. Hanley, 214 id. 243), and the court must define the issues to the jury without referring to pleadings to ascertain what they are. (Krieger v. A. E. & C. R. R. Co., supra; Walters v. City of Ottawa, 240 Ill. 259; Mooney v. City of Chicago, 239 id. 414.) In the first count of the declaration in the instant case it was charged that the defendant owned, operated and controlled the taxicab; that plaintiff was a passenger therein; that it was

first cause of the accident which caused negligence in the
dividing and operation of the automobile. Furthermore, the negli-
gence of the defendant is an affirmative and is directly attributed
that the giving of the instruction was not of such a nature
as to mislead the jury in a way as to cause them to believe that
City of Chicago, Ind. Ill. (1911), and there is no claim that

the amount of the judgment was excessive.
Instructions number 3 informed the jury that if they
believed from the evidence that the plaintiff was sane and his case
by a preponderance of the evidence as laid out in his petition
or some count thereof, then the jury should find for the plaintiff,
and if they further believe the plaintiff had sustained injuries
on account of the negligence of the defendant, as set forth and
alleged in his petition, or some count thereof, then the measure
of his recovery is such amount as will compensate him for such
injuries, etc.

The rule is that an instruction directing a verdict for
the plaintiff if the jury believe he has proved his case by a
preponderance of the evidence as laid out in his petition can only
be justified when the evidence contains a complete statement
of the case as set forth in City of Chicago v. Jones, 111 Ill.
200, 111 N.E. 2d 1001, 1002, 1003, 1004, 1005, 1006, 1007, 1008, 1009, 1010, 1011, 1012, 1013, 1014, 1015, 1016, 1017, 1018, 1019, 1020, 1021, 1022, 1023, 1024, 1025, 1026, 1027, 1028, 1029, 1030, 1031, 1032, 1033, 1034, 1035, 1036, 1037, 1038, 1039, 1040, 1041, 1042, 1043, 1044, 1045, 1046, 1047, 1048, 1049, 1050, 1051, 1052, 1053, 1054, 1055, 1056, 1057, 1058, 1059, 1060, 1061, 1062, 1063, 1064, 1065, 1066, 1067, 1068, 1069, 1070, 1071, 1072, 1073, 1074, 1075, 1076, 1077, 1078, 1079, 1080, 1081, 1082, 1083, 1084, 1085, 1086, 1087, 1088, 1089, 1090, 1091, 1092, 1093, 1094, 1095, 1096, 1097, 1098, 1099, 1100, 1101, 1102, 1103, 1104, 1105, 1106, 1107, 1108, 1109, 1110, 1111, 1112, 1113, 1114, 1115, 1116, 1117, 1118, 1119, 1120, 1121, 1122, 1123, 1124, 1125, 1126, 1127, 1128, 1129, 1130, 1131, 1132, 1133, 1134, 1135, 1136, 1137, 1138, 1139, 1140, 1141, 1142, 1143, 1144, 1145, 1146, 1147, 1148, 1149, 1150, 1151, 1152, 1153, 1154, 1155, 1156, 1157, 1158, 1159, 1160, 1161, 1162, 1163, 1164, 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2659, 2660, 2661, 2662, 2663, 2664, 2665, 2666, 2667, 2668, 2669, 2670, 2671, 2672, 2673, 2674, 2675, 2676, 2677, 2678, 2679, 2680, 2681, 2682, 2683, 2684, 2685, 2686, 2687, 2688, 2689, 2690, 2691, 2692, 2693, 2694, 2695, 2696, 2697, 2698, 2699, 2700, 2701, 2702, 2703, 2704, 2705, 2706, 2707, 2708, 2709, 2710, 2711, 2712, 2713, 2714, 2715, 2716, 2717, 2718, 2719, 2720, 2721, 2722, 2723, 2724, 2725, 2726, 2727, 2728, 2729, 2730, 2731, 2732, 2733, 2734, 2735, 2736, 2737, 2738, 2739, 2740, 2741, 2742, 2743, 2744, 2745, 2746, 2747, 2748, 2749, 2750, 2751, 2752, 2753, 2754, 2755, 2756, 2757, 2758, 2759, 2760, 2761, 2762, 2763, 2764, 2765, 2766, 2767, 2768, 2769, 2770, 2771, 2772, 2773, 2774, 2775, 2776, 2777, 2778, 2779, 2780, 2781, 2782, 2783, 2784, 2785, 2786, 2787, 2788, 2789, 2790, 2791, 2792, 2793, 2794, 2795, 2796, 2797, 2798, 2799, 2800, 2801, 2802, 2803, 2804, 2805, 2806, 2807, 2808, 2809, 2810, 2811, 2812, 2813, 2814, 2815, 2816, 2817, 2818, 2819, 2820, 2821, 2822, 2823, 2824, 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the duty of the defendant to so run his taxicab in such a manner so as not to injure plaintiff while so riding as aforesaid, but he, the defendant, failed in that behalf and ran his taxicab in a careless and negligent manner and ran into and struck a certain lamp post then and there standing on the west side of the driveway and by reason thereof the plaintiff was injured, and that during the entire occasion, plaintiff was in the act of all due care and caution for his own safety. At the request of the defendant the court gave to the jury eighteen instructions which covered all questions of law involved in the case, and what material facts must be found to authorize a recovery. Without going into a discussion of the different cases in which the Supreme Court has discussed instructions of the character now objected to, we are of the opinion, taking into consideration the allegations of fact set forth in the first count of the declaration, the facts as disclosed by the proofs and the instructions given on behalf of the defendant, the trial court did not err in the giving of this instruction. (Mt. Olive Coal Co. v. Rademacher, 190 Ill. 538, 542, and Chicago City Ry. Co. v. Carrell, 206 id. 318, 331, and cases cited.)

Instruction number 4, told the jury that the plaintiff had a right as a passenger of the defendant to be safely carried and safely delivered at his destination by the defendant, and that it was the duty of the defendant to use the highest degree of care and skill consistent with the practical operation of his business as a carrier of passengers for hire in transporting the plaintiff. Defendant's objection to this instruction is that there is no evidence in the record that he was a common carrier of passengers. There is no merit in this contention. It was clearly established that the defendant operated and controlled the taxicab for hire and that plaintiff hired the defendant to convey him in defendant's taxicab

the duty of the defendant to see that the plaintiff is not injured, but so as not to injure himself while he is trying to protect himself, but he, the defendant, failed in that behalf and his failure is a conscious and negligent manner and was done and struck a certain injury to the plaintiff and there is no doubt on the part of the jury and by reason thereof the plaintiff was injured, and that being the entire occasion, plaintiff was in the way of all due care and caution for his own safety. At the request of the defendant the court gave to the jury sixteen instructions which covered all questions of law involved in the case, and those instructions were found to authorize a verdict. Finding being into a discussion of the different cases in which the Supreme Court has discussed instructions of the character now objected to, the rule of the opinion, being into consideration the instructions of law and fact in the present case of the defendant, the facts as disclosed by the pleadings and the instructions given on behalf of the defendant, the trial court did not err in the giving of this instruction. 100 Ill. 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

to Soldiers Field.

It is also urged that the court committed an error in instruction number 2, in which the jury was told that a mere offer to release a valid claim is not binding unless accepted and a valuable consideration paid therefor. The objection being that there was no contention that there was a release. It appears that on cross-examination the plaintiff was asked if he had not signed a paper releasing the defendant, who owned the cab, and he answered he had signed what was supposed to be a receipt for \$250 and received a check for that amount; that before he signed this paper he was promised they would pay the hospital; that the hospital was not paid and he returned the check. The document referred to was introduced in evidence by the defendant, and from it it appears that it was a covenant not to sue. We do not think the giving of this instruction under these circumstances did the defendant an injury. It did not constitute reversible error.

It is finally contended that the court erred in refusing to withdraw a juror because of an allusion to an insurance company. It appears on direct examination in answer to a question, plaintiff answered, "When I went home my back kept on hurting. That is the reason I couldn't go around to the insurance company's place." Later, after the plaintiff had been asked on cross-examination if he had not signed a paper releasing the defendant, he was asked on redirect examination what happened after that and he replied, "I brought the check to the gentlemen in the insurance place." In each instance the court sustained defendant's objection to this testimony and instructed the jury to disregard the answers. Walter H. Gibson, a witness for plaintiff, was called to corroborate plaintiff in the fact that the check for \$250 had been returned, and while on the stand he was asked to tell what happened and the reply was, "He

to witness trial.

It is also noted that the court committed an error in

instruction number 2, in which the jury was told that a mere offer

to release a valid claim is not binding unless accepted and a

valid claim is not binding unless accepted and a

claim is not binding unless accepted and a release. It appears that

the court committed an error in instruction number 2, in which the

jury was told that a mere offer to release a valid claim is not

binding unless accepted and a release. It appears that the court

committed an error in instruction number 2, in which the jury was

told that a mere offer to release a valid claim is not binding

unless accepted and a release. It appears that the court committed

an error in instruction number 2, in which the jury was told that

a mere offer to release a valid claim is not binding unless

accepted and a release. It appears that the court committed an

error in instruction number 2.

It is finally recommended that the court error in ruling

be corrected and a new instruction be given to the jury.

It appears on review that the court committed an error in

instruction number 2, in which the jury was told that a mere

offer to release a valid claim is not binding unless accepted and

a release. It appears that the court committed an error in

instruction number 2, in which the jury was told that a mere

offer to release a valid claim is not binding unless accepted and

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instruction number 2, in which the jury was told that a mere

offer to release a valid claim is not binding unless accepted and

went into the insurance company." Defendant's motion to strike this answer was overruled. It also appeared from the record that in the exhibits offered by the defendant, reference was made to "surety" and "Royal Cab Insurance Co." We have carefully considered this contention of the defendant and in view of the facts in the instant case, and bearing in mind that the defendant did not controvert the charge of negligence, we find nothing in it that would warrant us in disturbing the verdict.

There is no reversible error in the record. The judgment will be affirmed.

AFFIRMED.

Oridley, P. J., and Scanlan, J., concur.

were also the same as before." "The same as before" is not a correct answer. It is also apparent from the record that in the exhibit offered by the defendant, reference was made to "entry" and "total cash payment." I have carefully considered this contention of the defendant and in view of the facts in the instant case, and bearing in mind that the defendant has not controverted the charge of negligence, we find nothing in it that would warrant us in concluding it is correct.

There is no reversible error in the record. The judgment will be affirmed.

THE COURT.

Griffey, J., and Dennis, J., concur.

35394

ANN HATHAWAY,
(plaintiff),
Appellee,

v.

A. R. SHANNON,
(defendant),
Appellant.

APPEAL FROM CIRCUIT COURT,
COOK COUNTY.

265 I.A. 600¹

MR. JUSTICE KEENER DELIVERED THE OPINION OF THE COURT.

Plaintiff recovered a judgment on the verdict of the jury against the defendant for \$3,750 because of injuries to her person received by being struck by an automobile. To reverse this judgment defendant appealed.

The plaintiff's declaration consisted of five counts. The second and third counts were withdrawn by plaintiff; the court sustained a demurrer to the fourth count and the cause went to the jury on the first and fifth counts. The first count alleged that on October 22, 1930, the plaintiff, while in the exercise of due care, was proceeding in a westerly direction across Wabash avenue and near the intersection of Madison street, Chicago, Illinois; that the defendant, by his servant, so carelessly, negligently, wrongfully and improperly drove his automobile southward on Wabash avenue that his automobile struck the plaintiff and she was thereby severely injured. The fifth count charges the same facts and that the defendant by his servant, drove his automobile without giving any reasonable warning of the approach of the automobile; without using every precaution to avoid injuring the plaintiff, and without stopping the automobile until it could safely proceed; upon approaching a person walking upon and along a public

32284

AND PATRICK,
(Plaintiff),

Appellant,

v.

A. A. BAKER,
(Defendant),

Appellant.

265 I.A. 600

MR. JUSTICE KEENE DELIVERED THE OPINION OF THE COURT.

Plaintiff recovered a judgment on the verdict of the jury against the defendant for \$2,700 because of injuries to her person received by being struck by an automobile. To reverse this judgment defendant appealed.

The plaintiff's declaration consisted of five counts.

The second and third counts were dismissed by plaintiff; the court sustained a demurrer to the fourth count and the same went to the jury on the first and fifth counts. The fifth count alleged that on October 22, 1930, the plaintiff, while in the exercise of due care, was proceeding in a westerly direction across Washington street and was in the intersection of Madison street, Chicago, Illinois; that the defendant, by his servant, so negligently, recklessly, wantonly and unlawfully drove his automobile so near and on Washington street that his automobile struck the plaintiff and she was thereby severely injured. The fifth count charges the same facts and that the defendant by his servant, drove his automobile without giving any reasonable warning of the approach of the automobile; without using every precaution to avoid injuring the plaintiff, and without keeping the automobile under his control.

highway, whereby the plaintiff was injured. The defendant filed a plea of general issue and a special plea of nonownership and operation.

The accident happened October 22, 1930, between 10:15 and 10:30 a.m., on Wabash avenue south of Madison street. Wabash avenue runs north and south. The width of Wabash avenue from curb to curb is 60 feet and nine inches. There were street car tracks on Wabash avenue; the space occupied by the street car tracks is 15 feet; above the street is an elevated roadway supported by steel beams or posts about 50 feet apart on either side of the street car tracks about 4 feet from the outer rail of the tracks. Madison street is 47 feet wide and is an east and west street.

The plaintiff testified that she left the Scholle Vurniture Company, located on the east side of Wabash avenue between Madison and Monroe streets, and walked north to about 50 feet south of Madison street. Here she saw the lights at Wabash avenue and Madison street turn from green to red; that she looked north and seeing no traffic coming started to cross and when she reached the northbound street car track noticed traffic coming from the south; that as the driver of the first car approached her he stopped and motioned her to proceed across the street, which she did, walking to about the center of the tracks where she looked north again; that at this time there was no traffic coming from the north and the lights on Wabash avenue were still red; that when she was in the southbound track (the west track on Wabash avenue) she noticed an automobile 15 or 20 feet north of her; that she turned to get out of its way but before she could move it was upon her; that it struck and hurled her in the air; that she did not hear the sounding of any horn or warning before she was struck. On cross-examination she testified that when she got to the first track there was a line of cars coming from just a little north of

highway, thereby the plaintiff was injured. The defendant filed a plea of denial and a special plea of nonownership and operation.

The accident happened October 24, 1934, between 10:15 and 10:30 a.m., on the south side of Madison Street. Madison Avenue runs north and south. The width of Madison Avenue from curb to curb is 60 feet and nine inches. There were street car tracks on Madison Avenue; the space occupied by the street car tracks is 18 feet; above the street is an elevated roadway supported by steel beams or posts about 30 feet apart on either side of the street car tracks about a foot from the outer edge of the tracks. Madison Street is 47 feet wide and is 40 feet wide street.

The plaintiff testified that she left the Chicago Furniture Company, located on the west side of Madison Avenue between Madison and Duane Streets, and walked north to about 30 feet south of Madison Street. Here she saw the light of a street car and Madison Street known from green to red; that she looked north and seeing no traffic coming started to cross and when she reached the sidewalk street car track noticed traffic coming from the north; that as the driver of the first car approached her he stopped and signaled her to proceed across the street, which she did, walking to about the center of the tracks where she looked north again; that at this time there was no traffic coming from the north and the lights on Madison Avenue were still red; that when she was in the middle of the track (the west track on Madison Avenue) she noticed an automobile 10 or 12 feet north of her; that she turned to get out of its way and before she could move it was upon her; that it struck and killed her in the left side; that she did not hear the sounding of any horn or warning before she was struck. On cross-examination she testified that when she got to the first track there was a line of cars coming from just a little north of

Monroe street (Monroe street is south of Madison street); that there were no cars stopped on the northbound track between her and Madison street; that there were no cars between the place where she crossed the northbound track and Madison street; that the automobile that struck her was going south on the west side of Wabash avenue; that it was close to but not in the street car track.

James C. Frym testified on behalf of plaintiff that he was employed by the Brinks Express Company and was sitting in the rear of an armored car parked, headed north on the east side of Wabash avenue 100 or 120 feet south of Madison street; that he heard a screeching of brakes, turned and saw plaintiff lying in the southbound track 20 to 40 feet south of the south line of Madison street.

On behalf of the defendant John Hofer testified that he was a chauffeur employed by the defendant; that he was driving a Packard automobile south on Wabash avenue with Mrs. Shannon sitting in the back seat; that he stopped at Madison street for the red light and remained there until the light changed; that there were no automobiles ahead of him; that while waiting for the red light to change he noticed 8 or 10 automobiles in the northbound track on Wabash avenue south of Madison street waiting for the light to change; when the light changed he proceeded south at about 12 to 14 miles an hour; that when he got about 100 or 125 feet from the corner plaintiff stepped out from behind a northbound automobile standing still in the northbound track; that she was running across the street; that the first time he saw her she was 6 or 8 feet from the automobile and the automobile was about 4 feet west of the place where she was the first time he saw her; that he slammed on his brakes and swung to the right; that the left front fender struck her and that she was then in the

London street (London street is north of Madison street) and
there were no cars stopped on the northbound street between
and Madison street; that there was no car between the place
where the crossed the northbound street and Madison street; that
the automobile that passed her was going south on the east side
of Madison street; that it was about 10 feet from the street
track.

James G. Ryan testified on behalf of plaintiff that
he was employed by the British Insurance Company and was sitting in
the rear of an armored car parked, headed north on the east side
of Madison street 100 or 120 feet south of Madison street; that he
heard a conversation of someone, named and was plaintiff lying in
the northbound track 25 to 40 feet south of the track line of
Madison street.

On behalf of the defendant John Walter testified that
he was a chauffeur employed by the defendant; that he was driving
a Packard automobile south on Madison street with Mrs. Johnson sitting
in the back seat; that he stopped at Madison street for the red light
and remained there until the light changed; that there were no auto-
mobiles ahead of him; that while waiting for the red light to change
he noticed a car 10 or 12 automobiles in the northbound track on Madison street
south of Madison street waiting for the light to change; when the
light changed he proceeded south at about 15 to 16 miles an hour;
that when he got about 100 or 120 feet from the corner plaintiff
stepped out from behind a northbound automobile waiting still in the
northbound track; that she was standing across the street; that the
first time he saw her she was 5 or 6 feet from the automobile and the
automobile was about 4 feet west of the place where she was the first
time he saw her; that he glanced on his right and away to the right;
that she left 1 foot further south and that she was then in the

center of the southbound track. On cross-examination he testified that the automobile had four wheel brakes, that the street was dry and that while going at 13 or 14 miles an hour he could stop his car in 10 feet; that as he was going south after he crossed Madison street his automobile was just a little west of the street car tracks, just enough to keep out of the rails; that he did not see the plaintiff when he started to cross Madison street; that he did not see her until she came from behind the car and then she was 6 or 8 feet ahead of him and 5 feet to his left and was running; that he turned to the west and put on his brakes and was going about 5 miles an hour when he struck her; that his right wheel was 3 or 4 feet west of the west rail when she was hit.

John P. Dugan testified on behalf of the defendant that he was parked in a Ford truck at the east curb of Wabash avenue between Madison and Monroe streets, facing north; that there were 3 or 4 cars in the northbound street car track going north; that he heard the screeching of a car and turned in time to see a woman struck; the car that struck her came to a stop about 5 feet west of the southbound track; when she was struck she was in the middle of the southbound track. On cross-examination he testified that upon looking up he saw the woman being hurled through the air; she was about 5 feet in the air.

In rebuttal the plaintiff testified that she did not run across the street at any time.

Defendant's counsel contends that the cause should be reversed on the ground that plaintiff was guilty of contributory negligence as a matter of law, and he argues that her conduct in leaving a place of safety to cross the street not at the regular crossing is inconsistent with the exercise of reasonable care for her own safety. The question of contributory negligence only be-

corner of the southeast corner. On cross-examination he testified that the automobile was not there. That the street was dry and that while going at 15 or 20 miles an hour he could easily see it in 15 feet; that on his way back south after he crossed Madison street his automobile was 15 or 20 feet west of the street at the time.

Truck. Just enough to keep out of the street; that he did not see the plaintiff when he started to cross Madison street; that he did not see her until she came from behind the car and then she was 5 or 6 feet ahead of him and 3 feet to his left and was running; that he turned to the west and put on his brakes and was going about 5 miles an hour when he struck her; that his right wheel was 3 or 4 feet west of the west wall when she was hit.

John F. Wright testified on behalf of the defendant that

he was parked in a Ford truck at the east curb of Adams street between Madison and Monroe streets, facing north; that there were 3 or 4 cars in the northwest corner of the block going north; that he heard the rattling of a car when it was in time to see a woman strike; the car that struck her came to a stop about 5 feet west of the southeast corner; that when she struck she was in the middle of the southeast corner. On cross-examination he testified that upon looking up he saw the woman being hurled through the air; she was about 5 feet in the air.

In rebuttal the plaintiff testified that she did not run across the street at any time.

Defendant's counsel contended that the case should be reversed on the ground that plaintiff was guilty of contributory negligence as a matter of law, and he argues that her conduct in leaving a place of safety to cross the street was at the regular crossing is inconsistent with the exercise of reasonable care for her own safety. The question of contributory negligence only be-

comes a question of law where the evidence is so conclusive that the court could arrive at no other conclusion than that the injury was the result of the negligence of the party injured. If there may be a difference of opinion on the question, so that reasonable minds will arrive at different conclusions, then it is a question of fact for the jury. Under all the facts and circumstances proved in the instant case we are of the opinion, the question as to whether the plaintiff was guilty of contributory negligence, was a question for the jury, and that she was not guilty of contributory negligence as a matter of law.

It is also contended that the court erred in allowing plaintiff's expert witness to testify, as it is claimed, to subjective symptoms. It is true it has repeatedly been held that the testimony of a physician is incompetent which is made after examination of the applicant and is based wholly on the physician's observation of outward manifestation within the applicant's control. (Greinke v. Chicago City Ry. Co., 234 Ill. 564). Plaintiff's counsel does not question the rule, but contends that the symptoms testified to by the physician were not subjective and that his knowledge of the plaintiff's condition was not based on any voluntary action on her part. Dr. Hardon testified, among other things, that it was impossible for the plaintiff to flex the lumbar spine so that she could go over with her hands to the floor, even though he put additional forces upon her back, and that the same condition existed when he tried to force lateral motion of the lumbar spine. On cross examination he stated that she couldn't bend over and get her hands near the floor, as the normal patient could; she couldn't get down even when forced; if she were trying to fake, the recto-spinal muscles would rise up; that her muscles did not rise up at all, so that she was not trying to hold back. No evidence was offered by the defendant to refute these statements of the physician regarding

the rising of the muscles. Under such a state of facts, we are of the opinion the court did not err in overruling the motion to strike the evidence of this witness (Schmidt v. Chicago City Ry. Co., 239 Ill. 494.)

Defendant also complains of the instructions given on behalf of the plaintiff. By instruction No. 16 the jury were told that if they believed from the evidence that the plaintiff, at the time of and prior to the accident in question, exercised that degree of care for her own safety that an ordinarily prudent person would have exercised under the same circumstances and conditions, as shown by the evidence, then they should find the plaintiff was, at and before the happening of the accident in question, in the exercise of ordinary care for her own safety. It is claimed this is not an accurate statement of the law and that the instruction is misleading. Ordinary care is that degree of care which is exercised by ordinarily prudent persons under the same or similar circumstances. (Austin v. Public Service Co., 209 Ill. 112, 120.) We cannot discover a shade of difference between this instruction and the instructions approved in Wilcke v. Henrotin, 241 Ill. 169, 172.

Instruction No. 17 was cautionary and did not direct a verdict. It told the jury that all the propositions of law in the several instructions are equally entitled to the consideration of the jury. The criticism to this instruction being that the court by the instruction indicated to the jury that they had a right to weigh the instructions. Defendant is justified in his criticism, but the error is not of such a degree as would warrant a reversal, especially in view of the fact that by defendant's instruction No. 8 the jury was told that the instructions must be accepted by them as the law governing the case.

Instruction No. 21 did not direct a verdict but told

the right of the master. Under such a state of facts, we are of the opinion the court should not be overruling the motion to strike the evidence of this witness (People v. ..., 252 Ill. App. 2d 111, 112).

Defendant also complains of the instructions given on behalf of the plaintiff. In instruction no. 18 the jury were told that if they believed from the evidence that the plaintiff, at the time of and prior to the accident in question, exercised due degree of care for her own safety that an ordinarily prudent person would have exercised better and more circumstances and conditions, as shown by the evidence, then they should find the plaintiff was at fault before the beginning of the accident in question, in the exercise of ordinary care for her own safety. It is claimed this is not an accurate statement of the law and that the instruction is misleading. Ordinarily such is that degree of care which is exercised by a reasonably prudent person under the same or similar circumstances. (People v. ..., 252 Ill. App. 2d 111, 112, 113.) We cannot discover a state of difference between this instruction and the instructions approved in People v. ..., 252 Ill. App. 2d 111, 112, 113.

IV.

Instruction no. 17 was erroneously and did not direct a verdict. It tells the jury that all the propositions of law in the several instructions are equally entitled to the consideration of the jury. The objection to this instruction being that the court by the instruction invited to the jury that they had a right to weigh the instructions. Defendant is justified in his objection, but the error is not as great as would appear a reversal, especially in view of the fact that by defendant's instruction no. 18 the jury was told that the instructions were to be accepted by them as the law governing the case.

Instruction no. 19 did not direct a verdict and told

the jury that the rights of persons on foot and drivers of automobiles upon the public highways are equal, and both are required to use such care as an ordinarily prudent person would use under like or similar circumstances; that persons are entitled to cross streets on foot and that while doing so they must use ordinary care for their own safety, and that drivers of automobiles must use ordinary care for the safety of pedestrians. In our opinion this instruction correctly stated the law (Kerchner v. Davis, 183 Ill. App. 600). Furthermore, the court gave at defendant's request an instruction in which the jury was told that the plaintiff was just as much bound to exercise ordinary care to look out for defendant's automobile and to avoid a collision with it, as was the driver of the automobile to look out for and avoid colliding with the plaintiff, and that one was not held to any higher degree of care than the other.

Defendant objects to instruction No. 26, claiming that it is misleading and leaves out of consideration the question of the preponderance of the evidence. This identical instruction was instruction No. 4 in the case of North Chicago St. R. R. Co. v. Rodert, 203 Ill. 413, 415, and in that case it was approved. Defendant, however, contends that the point raised in the instant case was not raised in North Chicago St. R. R. Co. v. Rodert, supra. At the request of the defendant in this cause the court gave to the jury twelve instructions which covered all the questions of law involved in the case and what material facts must be proved by a preponderance of the evidence to authorize a recovery, and by plaintiff's instructions Nos. 20 and 23 and defendant's instruction No. 6 specifically instructed the jury as to the preponderance of the evidence.

It is next claimed that the court erred in refusing to grant a new trial. The contention is that the court erred in refusing defendant a reasonable time in which to force the attendance of witnesses by means of attachment. It appears from the record that

[illegible]

the trial of the cause was commenced on July 15, 1931, and proceeded all of that day as well as July 16; at 10 a. m., July 17, counsel for defendant stated that when the cause was on the trial call on July 6, he subpoenaed all of his witnesses, including two who live at LaGrange, Illinois; that they came and were in court on that day; that the case went over; that he sent a representative to the home of these two witnesses last night; that these witnesses have closed their home and cannot be found. Thereupon the court said: "There is no motion for continuance," and counsel replied: "All I am asking for is a reasonable time to serve them; all I want is to get out there and get these men. I think an officer can get them." "The Court: All right; but if these witnesses are not here by three o'clock you will have to go ahead with this case." Defendant's counsel thereupon proceeded with the trial of the cause and after concluding the examination of the witnesses said: "That is all, if the court please, with the exception of these other witnesses I have spoken about." "The Court: I think about the best I can do for you would be to hold this matter over until three o'clock and then require you to finish it, whether you get the witnesses or not. I have a full calendar of important matters." Attorney for defendant: "All right."

It is obvious that defendant's counsel made no objection to the rulings of the court and did not contend at the time that he was not given reasonable time in which to force the attendance of the witnesses and that he voluntarily proceeded with the trial after he knew that he would not have the testimony of these two witnesses. Under this state of the record he is in no position to urge the ruling of the court as a ground for a new trial.

(Kendall v. Limberg, 69 Ill. 355, 359; City of Mattoon v. Worland, 97 Ill. App. 13, 18; Kehring v. Ricker, 126 Ill. App. 262.)

Finally it is urged the amount of the verdict is exces-

sive. The record discloses that previous to the accident the plaintiff was a healthy woman, 33 years of age, employed as an interior decorator, earning \$30 per week; that her actual expenses incurred on account of her injuries aggregated \$467; that after she was struck she was taken to a doctor's office for first aid, then to a hospital where she remained for eighteen days; that she had a "punctate" wound over the outer bone of her right ankle, with a hemotoma under the scalp in the back part of her head, and a sprain of the right shoulder and lower part of the back; that X-rays taken of the regions affected show a distortion of the spine, with excess bone formation on one side and contraction on the other, and an inflammatory condition on the left sacro-iliac joint and separation of the right sacro-iliac; that a skiagraph of the right ankle showed evidence of an incomplete fracture of the lower end of the fibula, and a fragment of bone tissue lying on the lower surface of the heel bone, also a stripping of the ligaments from the malleolus; that her right leg was placed in a Thomas splint, with an ice pack and a surgical dressing applied to the wound; that she was discharged from the hospital on November 9, and returned to her home; that after she was discharged from the hospital she continued to suffer pain in her back, head and ankle, and on November 18 she returned to the hospital where she remained until December 1st; that her ankle at the time of the trial was still sensitive, swells and becomes painful when she is on her feet; that the bony condition of the back causes her pain and she has sustained a distinct limitation of motion. In the light of these facts, we do not regard the verdict as excessive.

Finding no reversible error the judgment of the Circuit Court will be affirmed.

AFFIRMED.

Gridley, P. J., concurs.

Scanlan, J.; took no part in the decision.

35408

UNION BANK OF CHICAGO,
administrator of the estate
of JEANNE LOLA NAUMAN,
(plaintiff),
Defendant in Error,

v.

E. A. KALKHURST et al.,
Defendants.

GERTRUDE HAMMES,
Plaintiff in Error.

347
ERROR TO SUPERIOR

COURT, COOK COUNTY.

265 I.A. 600²

MR. JUSTICE KERNER DELIVERED THE OPINION OF THE COURT.

This writ of error was consolidated with appeal
No. 35407, and the judgment of the Superior court in that
case has this day been reversed and remanded.

For the reasons stated in the opinion filed in
that case the same order is entered in this cause.

REVERSED AND REMANDED.

Gridley, P. J., and Scanlan, J., concur.

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38408

ENTIRE BASE OF EVIDENCE,
admission of the estate
of JAMES LOUIS KIRKMAN,
(plaintiff),
Defendant in Error.

v.

R. A. KALMUSCH et al.,
Defendants.

WRIT TO QUASH

WRIT, COURT COUNTY.

265 I.A. 600

GRANTING WRIT,
Plaintiff in Error.

MR. JUSTICE HENDERSON delivered the opinion of the court.

This writ of error was consolidated with appeal
No. 38407, and the judgment of the superior court in that
case has this day been reversed and remanded.
For the reasons stated in the opinion filed in
that case the same order is entered in this case.
REVEREND AND HONORABLE.

GRIDLEY, P. J., and LEBLANC, J., concur.

35415

BERT L. T. WOODS,
(Plaintiff) Appellant,

vs.

FRANK A. MULHOLLAND,
(Defendant) Appellee.

357
APPEAL FROM CIRCUIT COURT,

COOK COUNTY.

265 I.A. 600³

MR. JUSTICE KERNER DELIVERED THE OPINION OF THE COURT.

Bert L. T. Woods brought an action in assumpsit to recover money which he had paid to the defendant on account of the purchase price of a lot and based his right to recovery on the ground that the purported written contract entered into by the parties for the sale and purchase of the lot was null and void "for want of a vendor." There was a trial without a jury, resulting in the court finding the issues for the defendant and entering judgment against plaintiff for costs, and plaintiff appealed.

Plaintiff's declaration consisted of the common counts and a special count in which plaintiff set forth in haec verba the purported contract and alleged it was signed by defendant and the plaintiff and that in consideration thereof the plaintiff paid defendant \$830; that said alleged contract did not purport to be a contract between plaintiff and any living or artificial person but to be a contract between the plaintiff and a written document or chose in action; that said purported contract is and always was null and void. The contract commences thus:

"FRANK A. MULHOLLAND'S
"79th STREET, CICERO and CRAWFORD AVENUES DEVELOPMENT

"THIS AGREEMENT made this 26th day of March, A. D. 1929, between Frank A. Mulholland, as Manager of 79th Street, Cicero and Crawford Avenues Development, of which the Chicago Title and Trust Company is Trustee under its Trust Number 16267, party of the first part," and Bert L. T. Woods, "as party of the second part,"

The document then recites that first party agrees that if second party shall make all payments and perform all the agreements

[Handwritten signature]

28418

WILLIAM L. WILSON, JR.
(Plaintiff)
vs.
WILLIAM L. WILSON, JR.
(Defendant)

2851 A. 600

THE COURT GRANTS THE PRAYER OF THE PETITION.

That the defendant is indebted to the plaintiff in the sum of \$100.00 and that the plaintiff is entitled to recover the same with interest thereon at the rate of 6% per annum from the date of the making of the loan until paid. The plaintiff further prays that the court order the defendant to pay the same to the plaintiff.

The defendant has failed to pay the same to the plaintiff as required by the terms of the loan. The plaintiff has been forced to pay the same to the defendant. The plaintiff is entitled to recover the same with interest thereon at the rate of 6% per annum from the date of the making of the loan until paid. The plaintiff further prays that the court order the defendant to pay the same to the plaintiff.

WITNESSED my hand and the seal of the court this 10th day of March, A.D. 1935.

WILLIAM L. WILSON, JR.
(Plaintiff)
vs.
WILLIAM L. WILSON, JR.
(Defendant)

The court grants the prayer of the petition.

hereinafter provided for the second party, first party will cause to be conveyed to the second party by a Trustee's deed all the right, title and interest of the Chicago Title and Trust Company as trustee, in and to certain described property. There are other provisions not material to the present issue. The contract is signed as follows:

"79th Street, Cicero and Crawford Avenues
Development, of which Chicago Title and
Trust Company is Trustee under its Trust
Number 16267.

By Frank M. Mulholland Manager.
Bert L. T. Woods (Seal)"

Attached to the declaration is plaintiff's affidavit of claim, setting forth substantially the facts set forth in the declaration and that the amount due plaintiff was \$897.45. The defendant pleaded non assumpsit and in his affidavit of merits denied that the contract "did not purport to be a contract between any living or artificial person," and alleged that the contract is a contract between plaintiff and defendant individually.

On the trial of the cause the parties stipulated that a short time before March 26, 1929, one Mitchell, a salesman and agent for defendant, called on plaintiff at his office and obtained a check, payable to defendant, dated March 26, 1929, for \$415; that he later produced the contract in question, signed by defendant, and received from plaintiff another check dated March 30, 1929, for \$415, also payable to defendant; that both checks were received and cashed by defendant; that on November 3, 1930, plaintiff demanded from defendant the return of the \$830, but no refund was made by the defendant. The contract and the two checks were received in evidence.

The defendant then proved over plaintiff's objections that the title to the lot in question on March 26, 1929, was in the Chicago Title and Trust Company as trustee, under an agreement

information furnished for the second party. The only will made to be conveyed to the second party by a trustee's deed all the right, title and interest of the Chicago Title and Trust Company as trustee, in and to certain described property. There are other provisions not related to the present issue. The contract is

signed as follows:

"We, the undersigned, Chicago Title and Trust Company, a corporation organized under the laws of the State of Illinois, do hereby certify that the within and foregoing is a true and correct copy of the original contract as the same appears in our records."

By Frank M. Williams, Secretary.
 Carl E. Woods (Seal)

Attached to the declaration is a plat of the property of claim, setting forth substantially the facts set forth in the declaration and that the same was executed on 10/1/42. The defendant placed her signature and in the plaintiff's name and that the contract "is not known to be a contract between any living or natural person," and alleged that the contract is a contract between plaintiff and defendant jointly.

In the trial of the case the parties stipulated that a short time before March 2, 1942, one Williams, a salesman and agent for defendant, called on plaintiff at his office and obtained a check, payable to defendant, dated March 28, 1942, for \$100.00. He later produced the check in question, signed by defendant, and received from plaintiff a check dated March 30, 1942, for \$100.00, payable to defendant; that both checks were received and cashed by defendant; that on November 2, 1942, plaintiff demanded from defendant the return of the \$100, but he refused to make by the defendant. The contract and the two checks were received in evidence.

The defendant then moved over plaintiff's objection that the case be dismissed on March 28, 1942, was in the Chicago Title and Trust Company as trustee, under an agreement

known as trust number 16267; that under said trust agreement certain named beneficiaries were permitted to control the sale and management of the property; that the trustee entered into a contract whereby defendant was appointed manager of the 79th Street, Cicero and Crawford Avenues Development, of which Chicago Title and Trust Company is trustee under its trust number 16267, and which permitted him to enter into contracts for the sale of parcels of the land.

In Weissbrodt v. Elmore & Co., 262 Ill. App. 1, where a very similar form of contract and trust agreement were involved, we held that the contract for the purchase and sale was binding. Plaintiff does not question that decision, but under the issues made by the pleadings in the instant case urges that defendant was restricted and limited to the defense set forth in his affidavit of merits, and that the evidence received over plaintiff's objection was incompetent, and cites Reddig v. Looney, 208 Ill. App. 413; Steinberg v. Schwartz, 219 Ill. App. 138, and other cases, to the effect that the affidavit of merits must set out the facts which constitute the defense, so that plaintiff may have reasonable notice of what the defense is, and that defendant would not be permitted to give in evidence any matter of defense not so stated in his affidavit of merits. Section 85, ch. 110, Cahill's Revised Statutes (1931), page 2179, provides that where a plaintiff files with his declaration an affidavit of claim, the defendant shall file with his plea an affidavit of merits, specifying the nature of the defense. The affidavit of claim in the instant case alleged that the contract did not purport to be a contract between the plaintiff and any living or artificial person, etc., while the affidavit of merits specifically denied this allegation. It is not necessary that evidentiary facts be pleaded. Facts constituting a defense are those facts which the evidence upon the trial will prove, and not the facts which will be required

known as trust number 10887; that under said trust agreement certain named beneficiaries were permitted to control the sale and management of the property; and that the trustee entered into a contract whereby defendant was appointed manager of the trust, Chicago and Travelers Insurance Company, of which Chicago 1118 and Trust Company is trustee under the trust number 10887, and which permitted him to enter into contracts for the sale of parcels of the land.

In Wainwright v. Chicago & Travelers Ins. Co., 308 Ill. App. 1, where a very similar form of contract was entered into between the parties, we held that the contract for the purchase and sale was binding. Plaintiff does not question that decision, but under the issues made by the pleadings in the instant case urges that defendant was restricted and limited in the defense set forth in his affidavit of merits, and that the evidence received over plaintiff's objection was inadmissible, and cites Wainwright v. Chicago & Travelers Ins. Co., 308 Ill. App. 418; Wainwright v. Chicago & Travelers Ins. Co., 308 Ill. App. 418, and other cases, to the effect that the affidavit of merits must set out the facts which constitute the defense, so that plaintiff may have reasonable notice of what the defense is, and that defendant would not be permitted to give in evidence any matter of defense not so stated in the affidavit of merits. Section 55, Ch. 111, Civil's Revised Statutes (1931), page 2179, provides that where a plaintiff files with his declaration an affidavit of merits, the defendant shall file with his affidavit of merits, specifying the nature of the defense. The affidavit of merits in the instant case alleged that the contract did not purport to be a contract between the plaintiff and any living or artificial person, etc., while the affidavit of merits specifically denied this allegation. It is not necessary that evidentiary facts be pleaded. Facts constituting a defense are those facts which the evidence upon the trial will show, and not the facts which will be required

to prove the existence of such facts. In Firestone Tire Co. v. Ginsberg, 285 Ill. 132, 136, the court said: "It is not required that the defendant should state the evidence but only the ultimate facts which would give notice of the nature of the defense." In Laskey v. Mendelsohn, 191 Ill. App. 597, it was held that under an affidavit of merits denying the sale of goods by plaintiff to defendant, it was competent for defendant to prove affirmative facts showing that the goods in fact had been sold to another ^{than} defendant. This is precisely the situation in the instant case. Defendant, under his affidavit of merits, was entitled to offer any evidence tending to prove that the contract was between the plaintiff and a living or artificial person. We hold that the testimony offered on behalf of defendant was admissible.

There is no merit in plaintiff's contention that because the defendant did not deny he was indebted to plaintiff in the sum of \$897.45 he is entitled to a judgment for that amount.

For the reasons indicated the judgment of the Circuit court is affirmed.

AFFIRMED.

Gridley, P. J., and Scanlan, J., concur.

[illegible]

35450

BENJAMIN ANSEHL,
(plaintiff),
Appellee,

v.

EDGEWATER BEACH HOTEL
COMPANY, (defendant),
Appellant.

36 7
APPEAL FROM SUPERIOR COURT,
COOK COUNTY.

265 I.A. 600⁴

MR. JUSTICE KERNER DELIVERED THE OPINION OF THE COURT.

Plaintiff recovered a judgment on the verdict of the jury against the defendant for \$3,500 because of injuries to his person while a guest in defendant's hotel. To reverse this judgment defendant appealed.

The plaintiff's declaration consisted of two counts. The first count alleged in substance that defendant operated a hotel, in which plaintiff was accepted as a guest; that it was the duty of defendant to keep and maintain the water faucets furnished by defendant for the use of its guests in a reasonably safe condition and repair; that defendant disregarded its duty in that regard; that while plaintiff was using one of its said water faucets it broke, shattered and splintered, and by means of the premises and negligence of defendant, plaintiff sustained injuries, etc. The second count charges that defendant neglected to keep said water faucets in reasonably safe condition and repair and negligently permitted the same to be and remain in a worn out, defective, cracked and unsafe condition and in such a fragile condition that the same was likely to break and injure persons using the same; that while he was using a certain water faucet, furnished by defendant for the use of its guests, it broke and shattered and as a direct result plaintiff was injured, etc. Both counts alleged

265 I.A. 600

COOK COUNTY.

APPEAL FROM CIRCUIT COURT.

BERNARD M. BROWN,
(Plaintiff).

Appellee.

v.

EDWARD M. BROWN
COMPANY, (Defendant).
Appellant.

MR. JUSTICE KENNEDY delivered the opinion of the court.

Plaintiff recovered a judgment on the verdict of the jury against the defendant for \$3,800 because of injuries to his person while a guest in defendant's hotel. To reverse this judgment defendant appealed.

The plaintiff's declaration consisted of two counts. The first count alleged in substance that defendant operated a hotel, in which plaintiff was accepted as a guest; that it was the duty of defendant to keep and maintain the water faucet furnished by defendant for the use of its guests in a reasonably safe condition and repair; that defendant disregarded its duty in that regard; that while plaintiff was using one of its said water faucets it broke, scattered and splintered, and by means of the premises and negligence of defendant, plaintiff sustained injuries, etc. The second count alleged that defendant neglected to keep said water faucets in reasonably safe condition and repair and negligently permitted the same to be and remain in a worn and defective, cracked and unsafe condition and in such a fragile condition that the same were likely to break and injure persons using the same; that while he was using a certain water faucet, furnished by defendant for the use of its guests, it broke and scattered and as a direct result plaintiff was injured, etc. Both counts alleged

plaintiff was at all times in the exercise of ordinary care for his own safety. The defendant filed a plea of general issue.

The evidence on behalf of the plaintiff discloses that the Edgewater Beach Hotel faces Lake Michigan on the one side and Sheridan road on the other; that about 4:00 p. m., Sunday, February 26, 1928, plaintiff and Oscar T. Blank arrived at the hotel, registered and were assigned to room 642, facing the lake, on the sixth floor of the hotel; it was a large, single room, with a bathroom in connection, containing a washbowl, bathtub and other toilet facilities; there was a large window in the bathroom and the light in the bathroom was very good; that the cold water faucet is on the right-hand side of the washbowl; the hot water faucet being on the left; the faucet handles consist of a metal shaft or core which is connected with and turns the faucet, a hollow porcelain sleeve fastened with cement, fits over this shaft. The faucet handles are about three and one-half inches long, the metal core extending to within about an inch of the outer end of the porcelain sleeve. In opening the faucet to let the water run, the faucet can be turned to the right or to the left; they were the "self-closing" type of faucet, which means it was necessary to hold the faucet handle in the open position with the hand in order to keep water flowing; when the hand is removed from the handle, the handle automatically returns to the closed position, this being accomplished by means of a vertical spring in the faucet which is compressed when the faucet is open and which operates to return the handle to a closed position of the faucet when the pressure of the hand against the handle is removed.

The only testimony as to the manner in which the accident occurred is that of plaintiff. He testified that immediately after entering the room he prepared to shave and went to the bathroom; that as he stood before the washbowl he noticed the plumbing was of

plaintiff was at all times in the exercise of ordinary care for his own safety. The defendant filed a plea of general issue.

The evidence on behalf of the plaintiff discloses that the defendant's son, John, was sitting on the one side and the other on the other; that about 4:00 p. m., Sunday, February 26, 1926, plaintiff and Jacob T. Blank arrived at the hotel, registered and were assigned to room 607, facing the lake, on the sixth floor of the hotel; it was a large, single room, with a bathroom in connection, containing a washbowl, bathtub and other toilet facilities; there was a large window in the bathroom and the light in the bathroom was very good; that the cold water faucet is on the right-hand side of the washbowl; the hot water faucet being on the left; the faucet handles consist of a metal shaft or core which is connected with and turns the faucet, a hollow porcelain sleeve fastened with cement, fits over this shaft. The faucet handles are about three and one-half inches long, the metal core extending to within about an inch of the outer end of the porcelain sleeve. In opening the faucet to let the water run, the faucet can be turned to the right or to the left; they were the "self-opening" type of faucet, which means it was necessary to hold the faucet handle in the open position with the hand in order to keep water flowing; when the hand is removed from the handle, the handle automatically returns to the closed position, this being accomplished by means of a vertical spring in the faucet which is compressed when the faucet is open and which operates to return the handle to a closed position of the faucet when the pressure of the hand against the handle is removed.

The only testimony as to the manner in which the accident occurred is that of plaintiff. He testified that immediately after entering the room he prepared to shave and went to the bathroom; that as he stood before the washbowl he noticed the plumbing was of

an old type; that there was a crack in the porcelain handle of the hot water faucet, evidenced by a dark brown or black line extending diagonally from the far side of the handle to the near side; that he took the handle of the faucet in the palm of his hand, closed his fingers around it and undertook to turn it; that he pushed it away from him, applying ordinary pressure; that it resisted a little bit, seemed to be stuck, and he gave it a little more pressure, not a great deal of pressure, and the handle cracked, his body fell against it, his wrist moved forward, and shattered portions of the porcelain and the metal core of the handle penetrated his wrist, causing a deep, horizontal cut on the underside of the forearm about one and one-quarter inches above the wrist.

Oscar T. Blank testified that immediately after arriving in the room plaintiff removed parts of his clothing preparatory to shaving, went into the bathroom and shortly after made an exclamation; Blank went to his assistance and found blood spurting from his wrist; that he wrapped a towel around his arm to stop the flow of blood; that he (Blank) had not been in the bathroom before the accident; had not seen the water faucet and knew nothing about its condition before the accident; that after the accident, he saw that the porcelain part of the handle of the faucet on the left side of the bowl was broken off; that the handle of the faucet was about three and one-half inches long and that about two and one-half inches of the porcelain broke off, leaving a jagged edge of porcelain surrounding a metal core, and part of the metal part projected out of the porcelain; that the major portion of the porcelain broken off was in one piece but there were other fragments; that he noticed the part of the porcelain that broke off was solid; that he examined the edges and color of it where it broke but saw nothing distinctive about the jagged portions at the place where it was broken.

an old type; that there was a crack in the porcelain handle of the hot water faucet, evidenced by a dark brown or black line extending diagonally from the side of the handle to the near side; that he took the handle of the faucet in the palm of his hand, placed his fingers around it and undid it as soon as that he pushed it away from him, applying ordinary pressure; that it resisted a little bit, seemed to be stuck, and he gave it a little more pressure, not a great deal of pressure, and the handle cracked. His body fell against it, his wrist moved forward, and shattered portions of the porcelain and the metal core of the handle penetrated his wrist, causing a deep, horizontal cut on the underside of the forearm about one and one-half inches from the wrist.

On the 11th of March testified that immediately after arriving in the room plaintiff removed parts of his clothing preparatory to washing, went into the bathroom and shortly after made an examination. Plaintiff went to his assistance and found blood spouting from his wrist; that he wrapped a towel around his arm to stop the flow of blood; that he (Plank) had not been in the bathroom before the accident; had not seen the water faucet and knew nothing about its condition before the accident; that after the accident, he saw that the porcelain part of the handle of the faucet on the left side of the bowl was broken off; that the handle of the faucet was about three and one-half inches long and about two and one-half inches of the porcelain broke off, leaving a jagged edge of porcelain surrounding a metal core, and part of the metal core projected out of the porcelain; that the major portion of the porcelain broken off was in one piece and there were other fragments that he noticed the part of the porcelain that broke off was solid; that he examined the edges and color of it while it broke but saw nothing distinctive about the jagged portions of the piece where it was broken.

Dr. Joseph A. Jerger testified that on February 27, 1928, he saw plaintiff professionally and found a ragged wound on the wrist of the right hand; that it had a couple of stitches in it; that the motion of the second, third and fourth fingers was missing; the reflex was absent and he had no nerve impulse there; that there was considerable swelling over the wrist joint and he could feel some foreign substance in the tissue; that he sent him to a hospital, opened up the hand and found all the tendons involving these three fingers were severed so there was no connection between the muscle controlling these fingers; that underneath the superficial tendon was a piece of porcelain approximately the size of a navy bean, which he took out and cleaned the wound; that the tendons had retracted, the muscles having pulled them up and shortened them, and they were not long enough to bring together; that he had to extend the wound about two inches, pick up the cut ends of the tendons, bring them down and splice them together; that he was under anaesthetic for two hours and twenty minutes, and that the fair and reasonable charge for such services was \$600; that he has examined the plaintiff in the court room and found the nutriment of the hand had been destroyed to some extent; that he cannot straighten his hand out; that he does not expect it to get better; that it will get worse. On cross examination he testified that he found a lateral scar just above the wrist, and above that about two inches, a longitudinal scar running the length of the arm; that the functional movement of the fingers is very good; that he has a good motion in the fingers; that there is thirty per cent interference of the wrist joint.

Catherine Twohig testified on behalf of the defendant that as a maid she had charge of room 642; that before she went off duty at two o'clock on the day of the accident she had been in the room,

dusting and scrubbing the bathroom; that she cleaned the faucets and in doing so opened them; that they worked easily and readily; that they were not cracked or broken and were in good condition.

Nora McClelland testified on behalf of the defendant that she had worked for the defendant for three and one-half years, but was not in its employ at the date of the trial; that in February, 1928, she had charge of the maids at the hotel; that she was not on duty on February 26; that she was in room 642 on the day before the accident making a general inspection of the room; that the handles on the water faucets were all right; that they were not cracked or broken.

Mary Wojtaszek, a maid, testified that she cleaned room 642 on Friday night preceding the accident and saw the faucets on the washbowl were in good condition; that the handles were not cracked or broken; that she came on duty February 26, 1928, at 4:00 p. m.; that at 5:00 o'clock she went to the room and saw a little blood on the washbowl and a broken handle on one of the faucets.

Benjamin E. Banks, an engineer employed by the defendant at the time of the accident, testified he was on duty February 26, 1928, and shortly after 4:00 o'clock he was called to room 642 to repair a broken handle of the water faucet; that he found the handle slightly broken on the cold water faucet; that the porcelain on the handle was cracked; that he tested the faucet before he took the handle off and it worked freely and that he did not find a thing wrong with the faucet except the porcelain. On cross examination he testified the plumbing in the hotel was not antiquated, out-of-date plumbing; that he took the broken faucet handle down and laid it on Mr. Fitzmaurice's desk, and that was the last time he saw it.

James Fitzmaurice, superintendent of maintenance, testified he did not remember ever seeing the broken handle.

dusting and scrubbing the bathroom in the afternoon and evening and in doing so covered them with soap suds and water and that they were not cleaned or dried and were in such condition.

When defendant testified on behalf of the defendant

that she had waited for the defendant for three and one-half hours, but was not in the toilet at the time of the trial, that in February, 1938, she had charge of the toilet at the hotel and she was not on duty on February 21; that she was in room 642 on the day before the accident making a general inspection of the room; that she handled in the water faucets were all right; that they were not cracked or broken.

Dr. J. J. Johnson, a nurse, testified that she cleaned room 642 on Friday night preceding the accident and saw the faucets on the wall; that there was in good condition; that the handles were not cracked or broken; that she was on duty February 21, 1938, at 4:00 P. M.; that at 5:00 o'clock she went to the room and saw a little blood on the wallboard and a broken handle on one of the faucets.

Defendant E. J. Doherty, an engineer employed by the defendant

at the time of the accident, testified he was on duty February 21, 1938, and shortly after 10:00 o'clock he was called to room 642 to repair a broken handle of the water faucet; that he found the handle slightly broken on the side water faucet; that the porcelain on the handle was cracked; that he found the faucet before he took the handle off and it worked freely and that he did not find a thing wrong with the faucet except the porcelain. On cross examination he testified the plumbing in the hotel was not antiquated, out-of-date plumbing; that he took the broken faucet handle down and laid it on the defendant's desk, and that was the last time he saw it.

James J. Fitzgerald, superintendent of maintenance, testified

he did not remember ever seeing the broken handle.

H. Daniel Sabel testified on behalf of the defendant that on February 23, 24 and 25, 1928, he and his wife were guests of the hotel and occupied room 642; that he had occasion to use the washbowl in the bathroom; that he did not notice a thing wrong with the faucets; that they were in perfect shape, working very easily.

Mrs. Lela Roger Sabel testified that she and her husband were guests at the hotel on February 23 and left Friday evening, February 25; that they occupied room 642; that during their stay the condition of the faucets in the bathroom was perfectly all right in every respect; that there were no cracked handles on the faucets and no marks on the handles to indicate that they were cracked.

An innkeeper's liability for the condition and operation of his hotel is limited to the failure to exercise ordinary care. (Clancy v. Barker, 131 Fed. 161; Weeks v. McMulty, 101 Tenn. 406; Sheffer v. Willoughby, 163 Ill. 518; Rice v. Warner Hotel Co., 201 Ill. App. 530; Patrick v. Springs, 154 North Carolina 270; Lyttle v. Denny, 222 Pa. 395, and Reid v. Ehr, 43 North Dakota 109.) Defendant contends the evidence did not warrant the jury in finding for the plaintiff, because it does not show defendant guilty of such negligence as renders it liable, and in arguing for a reversal says, that there was no evidence that defendant had any actual notice of the crack in the handle or that defendant in the exercise of any degree of care could have had any knowledge of the existence of the defect; that there was no evidence as to how long the crack had existed, and that the evidence for defendant showed that it had no knowledge of the alleged defect. In Rice v. Warner Hotel Co., supra, the plaintiff sought to raise a window in her room, which seemed to stick and it then started with a "bang", and the glass flew out, cutting her arm. It was contended the injury resulted from her own

carelessness and that the judgment was against the manifest weight of the evidence. In disposing of these contentions the court said, page 537: "The question remains as to whether the condition of the window as testified to * * * would have been known to appellant if proper inspection had taken place, and, if known, was sufficient to warrant an inference of negligence in not causing it to be remedied. This * * * was an issue of fact which was properly submitted to the jury * * *. The jury's verdict * * * determined that question in her favor * * *." In Patrick v. Springs, supra, the room to which the guest was assigned was lighted by gas and the gas fixture had no stop or safety pin in it so that the key was loose and could not be turned all the way around. The guest testified he discovered there was no stop pin; that he turned the key at the place where it should stop and that he smelled no gas. During the night he was asphyxiated but managed to call for help. The contention was, as here, that the guest had failed to establish negligence. The court, at page 272, said: "When the plaintiff proved the unsafe and defective condition of the gas fixture, in consequence of which gas escaped during the night and injured him, he made out a prima facie case of negligence, * * *."

In the instant case there is a conflict in the evidence it is true, but the verdict of the jury means that they believed the testimony of the plaintiff that there was a crack in the porcelain handle and that they accepted his version of the accident, and that they did not believe the witnesses for the defendant, and this they had a right to do (Podolski v. Stone, 186 Ill. 540; Kennedy v. Modern Woodmen, 243 id. 560), and in view of this fact we must accept his testimony as true, and give to it the benefit of all the inferences which can reasonably be drawn therefrom. The law does not require positive ocular proof. Nor does negligence have to be proven beyond

circumstances and that the judgment was against the plaintiff's weight of the evidence. In the opinion of these gentlemen the court said, page 837: "The question remains as to whether the condition of the window as testified to by the plaintiff would have been known to appellant if

proper inspection had been made, and, if known, was sufficient to warrant an inference of negligence in not causing it to be remedied. This * * * was an issue of fact which was properly submitted to the

jury * * *. The jury's verdict * * * determined that question in her favor * * *. In Stark v. Stark, 200 Ill. 100, the court said: "The fact was undisputed that the plaintiff was in the room to which the defendant was admitted by her and the gas fixture had no stop or safety pin in it at the time the gas was turned on and could not be turned off by the plaintiff. The gas fixture was discovered there was no stop pin; that the defendant had the key of the gas where it should stop and that he turned on the gas. During the night he was awakened but managed to call for help. The condition was, as stated, that the gas fixture had failed to extinguish the gas. The court, at page 838, said: 'When the plaintiff proved the unsafe and defective condition of the gas fixture, in consequence of which gas escaped during the night and injured him, he made out a prima facie case of negligence.'

* * *

In the instant case there is a conflict in the evidence as to the facts, but the verdict of the jury means that they believed the testimony of the plaintiff that there was a crack in the porcelain handle and that they accepted his version of the accident, and that they did not believe the witnesses for the defendant, and this they had a right to do. (Stark v. Stark, 200 Ill. 100; Stark v. Stark, 200 Ill. 100; Stark v. Stark, 200 Ill. 100) and in view of this fact we must accept his testimony as true, and give to it the benefit of all the inferences which can reasonably be drawn therefrom. The law does not require positive actual proof. Nor does negligence have to be proven beyond

a reasonable doubt. Circumstantial evidence, such as exists here, and by which the mind is impelled to make certain deductions, is sufficient. (Kennedy and Daugherty v. Aetna Life Ins. Co., 148 Ill. App. 273, 282; Devine v. Delano, 272 Ill. 166, 179.) The jury could rightfully hold from the fact that the crack was discolored, that it was not of recent origin, and that it had existed for such length of time that notice to defendant of its condition might be inferred. We think it was within the province of the jury to say whether the injury to the plaintiff was caused by the want of ordinary care on the part of the defendant.

It is next contended that there can be no recovery here because plaintiff was guilty of contributory negligence, defendant arguing the testimony of the plaintiff, that before he attempted to turn the faucet he saw the porcelain was cracked, cannot be characterized otherwise than negligence on his part. It is true that if there is any conflict in the evidence and the court can clearly see that the injury was the result of the negligence of the party injured, the jury should be instructed for the defendant (Reidler v. Branchaw, 200 Ill. 425; Munden v. East St. Louis Light & Power Co., 247 Ill. App. 270), but where reasonable men acting within the limits prescribed by law reach different conclusions, or different inferences could reasonably be drawn from the established facts, the question of contributory negligence is for the jury. (Mueller v. Phelps, 252 Ill. 630, 634; Heidenreich v. Brenner, 260 id. 439, 452.) There is no evidence that plaintiff was aware that the operation of the faucet in the manner testified to by him would result in its shattering and cutting him. After a careful consideration of all the evidence and applying the rules announced, we cannot say that the evidence necessarily leads to but one conclusion. (Chicago & Joliet Ry. Co. v. Wanic, 230 Ill. 530.) It was a question for

that the evidence necessarily leads to one conclusion. (Citation of all the evidence and applying the rules announced, we cannot say result in the ascertaining and setting him. After a careful consideration the opinion of the court is the manner justified to by him would 14, 439, 433.) There is no evidence that plaintiff was aware that (Hawley v. Hawley, 201 Ill. 437, 434; Hawley v. Hawley, 201 Ill. 437, 434.) The question of contributory negligence is for the jury. Within the limits prescribed by law each different conclusion, or a court could say that the evidence is for the jury. (Hawley v. Hawley, 201 Ill. 437, 434; Hawley v. Hawley, 201 Ill. 437, 434.) But where reasonable men acting

the jury.

A further ground for reversal is urged in that instruction No. 1 should not have been given. It is claimed that by this instruction the jury would understand the law to require defendant to keep the faucets "in a reasonably safe condition," in other words, that it placed the defendant under a greater duty than was imposed by law, which was to "use reasonable care to keep the faucet in reasonably safe condition." By defendant's instruction No. 11 the jury were told it was the defendant's duty to "use ordinary and reasonable care to keep and maintain the faucet in a reasonably safe condition." We do not think the jury were misled by the instruction, as contended. If, however, there be any basis for such criticism, it is sufficient answer to say defendant is in no position to complain. The case was tried upon the theory that it was defendant's duty to keep and maintain the faucet in a reasonably safe condition for the use of its guests. Moreover, if it be assumed that the instruction complained of is erroneous, defendant could not take advantage of any such error since its own instruction No. 11 told the jury it was defendant's duty to provide water faucets which were in a reasonably good state of repair. (Fleming v. Elgin, Joliet & Eastern Ry., 275 Ill. 486, 493; Lerette v. General Director, 306 id. 348, 354.)

Defendant's counsel also insists that the court erred in modifying instruction No. 5 by striking from the instruction the concluding clause as follows: "If you believe from the evidence that plaintiff could have avoided the accident by using ordinary care and diligence for his own safety at the time and place in question, then you should find defendant not guilty," arguing that this was the only instruction which told specifically that the proposition that plaintiff could not recover if the accident was caused by any lack of reasonable care on his part. Modifying the instruction did not

• 222 •

The court found the jury was not in error in that instruction No. 1 should not have been given. It is claimed that by this instruction the jury would understand the law to require defendant to keep the furnace "in a reasonably safe condition," in other words, that it placed the defendant under a greater duty than was imposed by law, which was to "use reasonable care to keep the furnace in reasonably safe condition." If defendant's instruction No. 11 the jury were told it was the defendant's duty to "use ordinary and reasonable care to keep and maintain the furnace in a reasonably safe condition," it is not likely the jury were misled by the instruction, as contended. If, however, there be any basis for such criticism, it is sufficient answer to say defendant is in no position to complain. The case was tried upon the theory that it was defendant's duty to keep and maintain the furnace in a reasonably safe condition for the use of its guests. Moreover, it is to be assumed that the instruction complained of is erroneous, defendant could not take advantage of any such error since its own instruction No. 11 told the jury it was defendant's duty to provide water heaters which were in a reasonably good state of repair. (Exhibit A, Exhibit B, Exhibit C, 111. 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000)

constitute an error for the reason that the language eliminated was merely a restatement of the rule announced in the instruction as given to the jury. Furthermore, defendant's instruction No. 2 told the jury that plaintiff could not recover unless he proved by a preponderance of the evidence that he did not contribute to his injury by any want of reasonable and ordinary care for his own safety.

It is also insisted the court erred in refusing instruction No. 3. The rule announced in this refused instruction was fully covered by defendant's given instruction No. 13.

It is finally contended that the court erred in the admission of evidence and that counsel for plaintiff was guilty of improper conduct. In support of this contention counsel states that Catherine Twohig, a witness for defendant, on cross examination was permitted to express her opinion on one of the issues before the jury. It appears from the record she was asked if a mere crack in a porcelain handle did not render it unfit for service, but the witness did not answer the question. She was then asked, without objection, "Q. Isn't it a fact, if you saw a very slight crack or a mark in a porcelain handle you pay no attention as long as the handle is intact?" and she answered, "No sir, I would not. It might cause danger to myself because I handle them every day." There was no objection to the answer or motion to strike. She was also asked if there was not a good deal of discussion about the faucets and their operative condition right after the accident, and the people in the hotel, including plaintiff, visited the rooms and more than half of the faucets had cracks. Objection to this question was sustained. If the propounding of this question was error it was made harmless by the 26th instruction given at the request of the defend-

ant, in which the jury were told that the case must be decided upon the evidence and not upon the statements of counsel outside of and unsupported by the evidence. The record also discloses that over objection she was then asked: "Q.You realize that in none of the other rooms were there any cracks in faucets?" To which the witness replied that the faucets in the other fourteen rooms of which she was in charge were in "perfect condition" and that this was true of the faucets in these other rooms both before and after the accident. That was true the day before the accident, two days before, the day after and two days after the accident. There was no motion to strike this answer.

It is obvious from this record that the witness did not express an opinion, as contended for, and no objection being made to the question as to what she did if she saw a slight crack, the errors assigned are not well taken. The objection to the question as to what occurred after the accident was properly sustained and the question should not have been propounded. However, upon the state of the entire record, we are of the opinion the errors assigned are not such as would warrant us in reversing the judgment.

The judgment of the Superior court is affirmed.

AFFIRMED.

Gridley, P. J., concurs;

Seannan, J., took no part in the decision.

and, in which the jury were told that the same must be decided upon the evidence and not upon the statements of counsel outside of and unsupported by the evidence. The record also discloses that over objection the use was made of the following: "You realize that in none of the other rooms were there any cracks in the wall?" To which the witness replied that she knew in the other fourteen rooms at which she was in charge were in "perfect condition" and that this was true of the Tanager in these other rooms both before and after the accident. That was true in the way stated and consistent. Two days before, the day after and two days after the accident.

There was no motion to strike this answer.

It is obvious from this record that the witness did not express an opinion, as contended for, and no objection being made to the question as to what she did if she saw a slight crack, the errors assigned are not well taken. The objection to the question as to what occurred after the accident was properly sustained and the question should not have been propounded. However, upon the issue of the entire record, we are of the opinion the errors assigned are not such as would warrant an reversing the judgment. The judgment of the superior court is affirmed.

REVEREND.

WITNESSES: J. J. CONNOR;

JOHN J. CONNOR, J. J. CONNOR, JR. in the presence.

35052

THE COUNTY OF LAKE, STATE OF
ILLINOIS, for the use of
F. H. Dickson,

Appellee,

v.

MASSACHUSETTS BONDING AND
INSURANCE COMPANY, a
corporation,

Appellant.

APPEAL FROM MUNICIPAL

COURT OF CHICAGO.

265 I.A. 600⁵

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

This is an action in debt brought for the use of F. H. Dickson upon the bond of a road contractor who contracted to build a section of road in Lake county, Illinois. The claim of Dickson is for \$2,410.68 due him from the contractor for groceries and meats furnished to the latter. In a trial before the court there was a finding that the defendant owes the plaintiff, in debt, \$95,896.04, and the plaintiff's damages were assessed at \$2,410.68. By stipulation the court in the same hearing also tried the case of The County of Lake, State of Illinois, for use of F. H. Dickson v. Southern Surety Company, App. Ct. Gen. No. 35049, in which we have this day filed an opinion. The two cases involve similar bonds and facts, and the same questions of law, and while separate appeals were taken, the cases have been considered together in this court and we refer to our opinion in Gen. No. 35049 for our reasons in reversing the judgment in the instant case.

The judgment of the Municipal court of Chicago is reversed.

REVERSED.

Gridley, P. J., and Kerner, J., concur.

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64-31200-10A

262 I.A. 600

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CONCLUSIONS

1571

4. The above information is true and correct to the best of my knowledge and belief.

35303

THE PEOPLE OF THE STATE OF
ILLINOIS,

Defendant in Error,

v.

FRANK HEALY,

Plaintiff in Error.

ERROR TO MUNICIPAL

COURT OF CHICAGO.

265 I.A. 601

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

The People of the State of Illinois filed an information against the defendant, Frank Healy, charging him with unlawfully driving an automobile upon the street in the absence of the owner of the automobile and without his consent, in violation of sec. 30, par. 31, ch. 95a, Callaghan's Ill. Rev. Stat. The defendant waived a jury and the court found him guilty as charged in the information and sentenced him to ten days in the House of Correction and to pay a fine of one dollar. The defendant has sued out this writ of error. The People have not seen fit to defend the record.

The statute in question reads as follows:

"No chauffeur or other person shall drive or operate any motor vehicle or motor bicycle upon any street, or highway in this State in the absence of the owner of such motor vehicle or motor bicycle without said owner's consent; and no chauffeur or other person having the care of a motor vehicle for the owner shall receive or take directly, or indirectly, any bonus, discount or other consideration, for the purchase of supplies or parts for such motor vehicle or for work or labor done thereon by others; and no person furnishing such supplies or parts, work or labor, shall give or offer any such chauffeur or any other person having the care of a motor vehicle for the owner thereof, either directly or indirectly, any bonus, discount or other consideration thereon. Any person violating any of the provisions of this section shall be guilty of a misdemeanor, and upon conviction shall be fined the sum of not exceeding two hundred dollars (\$200.00), or imprisoned in the county jail for a period not exceeding six (6) months, or both, in the discretion of the court."

The defendant contends that "the information is insufficient and defective in that it fails to name the owner of the automobile in question." As the information fails to state the name of the owner of the automobile in question, the contention is a meritorious one. (See The People v. Kasker, 209 Ill. App. 597; The People v. Blue, 222 Ill. App. 255.) The sufficiency of the information was raised in the court below by a motion in arrest of judgment, but even without such a motion it would be proper to raise the question for the first time in this court. (The People v. Weiss, 168 Ill. App. 502, 510.)

The judgment of the Municipal court of Chicago is reversed, and as The People may, if they see fit, amend the information, the cause is remanded.

REVERSED AND REMANDED.

Gridley, P. J., and Kerner, J., concur.

The defendant contends that "the information is insufficient and defective in that it fails to name the owner of the automobile in question." As the information fails to state the name of the owner of the automobile in question, the contention is a sufficient one. (See The People v. Fisher, 203 Ill. App. 3d 357, 282 Ill. App. 3d 352.) The sufficiency of the information was raised in the court below by a motion to quash the indictment, and even without such a motion it would be proper to raise the question for the first time in this court. (The People v. Fisher, 203 Ill. App. 3d 357, 282 Ill. App. 3d 352.) The judgment of the Municipal Court of Chicago is reversed, and as the People say, if they are right, amend the information, the cause is remanded.

REVEREND AND HONORABLE.

GRADY, J., and BAKER, J., concur.

35335

THE WHITE EAGLE BUILDING
AND LOAN ASSOCIATION, a
Corporation,

Appellant,

vs.

ESTELLE KWIATKOWSKI et al.,
Appellees.

39 A
APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

265 I.A. 601²

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

The complainant is a corporation, organized under the Building and Loan statutes of Illinois, and it filed an amended bill to foreclose a mortgage executed by certain members of the association. The cause was referred to a master, who heard evidence and filed a report recommending that a decree of foreclosure and sale be entered. The chancellor sustained objections to the master's report and entered a decree that the amended bill of the complainant be dismissed for want of equity. The complainant has appealed.

After a careful study of the master's certificate of evidence we have reached the conclusion that the evidence, in its present shape, is not sufficient to enable us to determine the rights of the parties. It is evident that neither side presented satisfactory evidence in support of its case and we are convinced that justice demands a retrial of this cause. We purposely refrain from analyzing and commenting upon the evidence adduced and we do not intimate by our judgment any opinion as to the merits of the controversy.

The decree of the Circuit court of Cook county is reversed and the cause is remanded with directions to the chancellor to have the cause again referred to a master for a hearing de novo.

REVERSED AND REMANDED WITH DIRECTIONS.

Gridley, P. J., and Kerner, J., concur.

25552

THE STATE OF ILLINOIS
JANUARY 1, 1901

IN SENATE

18

REPORT OF THE
COMMISSIONER OF THE LAND OFFICE

REPORT OF THE COMMISSIONER OF THE LAND OFFICE

OF THE YEAR 1900

255 I.A. 001

THE COMMISSIONER OF THE LAND OFFICE

The Commission is a corporation, organized under the
Building and Loan Association of Illinois, and is filed an amended
bill to foreclose a mortgage executed by certain heirs of the
association. The same was referred to a master, who heard evi-
dence and filed a report recommending that a decree of foreclosure
and sale be entered. The Chancellor sustained objections to the
master's report and entered a decree that the amended bill of the
complainant be dismissed for want of equity. The complainant
has appealed.

After a careful study of the master's certificate of
evidence we have reached the conclusion that the evidence, in its
present state, is not sufficient to enable us to determine the
rights of the parties. It is evident that neither side presented
satisfactory evidence in support of its case and we are convinced
that justice demands a retrial of this cause. We purposely refrain
from analyzing and commenting upon the evidence adduced and we do
not intimate by our dissenting opinion as to the merits of the
controversy.

The decree of the Circuit Court of Cook County is
reversed and the cause is remanded with directions to the Chancellor
to have the cause again tried to a master for a hearing de novo.
REVEREND AND HONORABLE JUSTICE

GRADY, J. J., and others, vs. ...

35376

JOHN RYBICKI, Admr. of the Estate
of WLADYSLAWA RYBICKI, Deceased,
Defendant in Error,

v.

JOSEPH KOPTERSKI,
Plaintiff in Error.

407
ERROR TO CIRCUIT

COURT, COOK COUNTY.

265 I.A. 601³

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

John Rybicki, Administrator of the Estate of Wladyslaw Rybicki, Deceased, filed a verified petition in the Probate court of Cook county against Joseph Kopterski, the respondent. The petition, brought under section 81 of the Administration act, alleges that the administrator is informed and believes that the respondent is withholding from him certain assets (naming them) and "other assets not definitely known to petitioner and refuses to deliver the same to petitioner," and the petitioner prays that the respondent be cited into court "for failure to turn over the foregoing property to the administrator and that he be required to appear upon a day certain that he may be subjected to an examination under oath as to his knowledge of the foregoing items and other property belonging to said estate." In the Probate court the cause was tried by the court and there was a finding that a "certain promissory note executed by Kasimir Ochrenowicz in the sum of \$5000.00 dated July 16, 1925 which is now in the hands of The Foreman National Bank of Chicago for safe keeping under order of this Court * * * is the property of said Estate and said * * * Bank is hereby directed to deliver said note to said John Rybicki, Admr." The respondent prayed an appeal to the Circuit court, where the cause was tried de novo by the court without a jury, and there

JOHN TYDICK, Administrator of the Estate of Elizabeth Tydick, Plaintiff in Error,
vs.
JOSEPH KOSTERAKI, Defendant in Error.

ORDER TO DISMISS

Case No. 1001

25378

THE COURT HEREBY ORDERS THE DISMISSAL OF THE CASE.

John Tydick, Administrator of the Estate of Elizabeth Tydick, deceased, filed a verified petition in the Probate Court of Cook County against Joseph Kosteraki, the respondent. The petition, pursuant to section 61 of the Administration Act, alleges that the administrator is indebted and believes that the respondent is withholding from his certain assets (including cash) and "other assets not actually known to petitioner and known to deliver the same to petitioner," and the petitioner prays that the respondent be cited into court "for failure to turn over the foregoing property to the administrator and that he be required to appear upon a day certain that he may be enjoined to an examination under oath as to his knowledge of the foregoing items and other property belonging to said estate." In the Probate Court the cause was tried by the court and there was a finding that a "certain sum of money not stated by Exhibit A contained in the sum of \$5000.00 dated July 1st, 1915 which is now in the hands of The National Bank of Chicago for safe keeping under order of this Court" is the property of said estate and said sum of money is hereby directed to deliver said money to said John Tydick, Administrator. The respondent prays an appeal to the Circuit Court, where the cause was tried on July 1st, 1915, and there

was an order entered which contained the following:

"That said Joseph Kopterski has in his possession or has converted to his own use the following items of personal property which belong to the estate of Wladyslaw Rybicki, deceased, and to which he, said Joseph Kopterski has no right or title:

One fur coat belonging to said Wladyslaw Rybicki.
One set of sterling silverware of the value of \$250.00.
Money collected upon one interest coupon notes in the sum of \$150.00 upon a certain trust deed note belonging to said estate.

This court further finds that a certain trust deed note in the sum of \$5000.00 with interest at 6% per annum payable semi-annually, dated July 16, 1925, signed by Kasimir Ochronowicz and Ochronowicz, his wife, payable to the order of themselves and by them endorsed due July 16, 1928 and extended to July 16, 1931, together with an extension agreement dated July 16, 1928, and executed by Wladyslaw Rybicki, Kasimir Ochronowicz and

Ochronowicz, his wife, and four interest coupon notes in the sum of \$150.00 each dated July 16, 1928, due respectively January 16, 1930, July 16, 1930, January 16, 1931 and July 16, 1931, and a certain trust deed securing all of said above described notes and all other documents in connection with said trust deed and notes, all of which foregoing documents which have been heretofore impounded by the order of the Probate Court of Cook County, on or about December 5, 1929, with the Foreman Trust and Savings Bank, were and are the property of the estate of Wladyslaw Rybicki, deceased, and that said Joseph Kopterski, respondent herein has no interest in such documents whatsoever.

It is therefore ordered and decreed that the motion of the Appellant to dismiss his appeal is hereby denied.

It Is Therefore Ordered, Adjudged and Decreed By This Court that said Joseph Kopterski be, and he is hereby directed to turn over and deliver to John Rybicki, administrator of the estate of Wladyslaw Rybicki, deceased, upon the entry of this order the following described items of personal property belonging to said estate:

One fur coat belonging to said Wladyslaw Rybicki.
One set of sterling silverware of the value of \$250.00.
Money collected upon one interest coupon note in the sum of \$150.00 upon a certain trust deed note belonging to said estate.

It is Further Ordered, Adjudged and Decreed that the following described personal property was and is the property of the estate of Wladyslaw Rybicki, deceased, and that the said Joseph Kopterski has no right, title or interest therein:

A certain trust deed note in the sum of \$5000.00 with interest at 6% per annum payable semi-annually, dated July 16, 1925, signed by Kasimir Ochronowicz and Ochronowicz, his wife, payable to the order of

themselves and by them endorsed due July 16, 1928, and extended to July 16, 1931, together with an extension agreement dated July 16, 1928, and executed by Wladyslaw Rybicki, Kasimir Ochronowicz and Ochronowicz, his wife, and four interest coupon notes in the sum of \$150.00 each dated July 16, 1928, due respectively Jan. 16, 1930, July 16, 1930, January 16, 1931 and July 16, 1931, and a certain trust deed securing all of said above described notes and all other documents in connection with said trust deed and notes, all of which foregoing documents which have been heretofore impounded by the order of the Probate Court of Cook County, on or about December 8, 1929, with the Foreman Trust and Savings Bank until the further order of said Probate Court.

And It Is Hereby Ordered that said Foreman Trust and Savings Bank be and it is hereby directed to deliver upon the entry of this order to said John Rybicki, Administrator of the estate of said Wladyslaw Rybicki, deceased, the said papers and documents so impounded with said Bank.

It Is Further Ordered, Adjudged and Decreed that in the event said respondent, Joseph Kopterski, fails or refuses to comply with the terms of this order within twenty days of the date of the entry of this order that he shall be subjected to the penalties provided by law and in accordance with the statutes of this State in such case made and provided."

In his brief, filed in this court, the respondent raised nine contentions, but upon the oral argument he abandoned all of them save the fourth and sixth. The fourth contention is that "the court erred in admitting incompetent evidence on behalf of petitioner," and the sixth, that "a judgment against the clear weight of the evidence will be set aside." The respondent makes no complaint as to the order save as it bears upon the \$5,000 promissory note. The petitioner's theory of fact as to the note may be briefly stated as follows: That on July 16, 1925, Kasimir Ochronowicz borrowed \$6,500 from the deceased and executed therefor four principal notes, the first three in the sum of \$500 each and the last in the sum of \$5,000, all of the notes being secured by a trust deed on certain real estate in Chicago; that the entire \$6,500 was loaned to Ochronowicz by the deceased out of funds belonging to her; that the notes were deposited in her safe deposit box at the real estate office of Steven S. Tyrakowski and that after her death the respondent, ~~who was~~ a brother of the deceased, removed

themselves and by them endorsed due July 16, 1933, and
extended to July 16, 1933, together with an extension
agreement dated July 16, 1933, and executed by Elizabeth
Tyndall, Elizabeth Tyndall and
his wife, and their interest in the sum of
\$100.00, each dated July 16, 1933, and respectively July
16, 1933, July 16, 1933, and July 16, 1933, and July 16,
1933, and a certain sum being received all of said above
described notes and all other documents in connection with
said notes were and have, and at such time as the same
which have been heretofore included by the order of the
Federal Reserve Bank of New York, on or about December 3, 1933,
with the Federal Reserve Bank and savings bank until the further
order of said Federal Reserve Bank.

and it is hereby ordered that said Federal Reserve Bank and savings
bank be and it is hereby directed to deliver upon the entry of this
order to said Federal Reserve Bank, the said notes and documents so incorporated
with said Bank.

It is further ordered, that the said Federal Reserve Bank and savings
bank respondent, Joseph Tyndall, wife of Tyndall, to comply with this
order of this order within twenty days of the date of the entry of this
order that he will be subjected to the penalties provided by law and
in accordance with the contents of this order in each case made and
provided."

In this brief, filed in this court, the respondent raised
the following defenses, but upon the oral argument he abandoned all of
them save the fourth and sixth. The fourth contention is that "the
court erred in admitting incompetent evidence on behalf of petitioner,"
and the sixth, that "a judgment against the other party to the evidence
will be set aside." The respondent makes no complaint as to the order
save as it bears upon the \$2,500 promissory note. The petitioner's
theory of fact as to the note may be briefly stated as follows: That
on July 16, 1933, Elizabeth Tyndall borrowed \$2,500 from the deceased
and executed therefor four promissory notes, the first three in the sum
of \$500 each and the last in the sum of \$2,000, all of the notes being
secured by a first deed on certain real estate in Chicago; that the
entire \$2,500 was loaned to respondent by the deceased out of funds
belonging to her; that the notes were deposited in her safe deposit
box at the real estate office of James A. Tyndall and that after
her death the respondent, ~~James A. Tyndall~~ a brother of the deceased, removed

the \$5,000 note and certain interest notes from the box, and that the respondent has no interest of any kind or nature in the loan to Ochronowicz. The theory of fact of the respondent, as stated in his brief, is, "that the \$5,000 note has always belonged to respondent, the deceased having advanced only \$1,500 of the \$6,500 loan (this \$1,500 being represented by the three \$500 notes) and the other \$5,000 having been advanced by respondent out of his own funds; that the safe deposit box in Tyrakowski's office was owned by both respondent and deceased, and that in removing the \$5,000 note therefrom after her death, he was taking his own property from his own box." (Italics his.)

We will first consider the respondent's contention VI, viz., "A judgment against the clear weight of the evidence will be set aside." The respondent thus states the gist of his argument in support of this contention: "Substantially the only evidence for the estate is that of Thomson, the attorney witness, that the respondent admitted inferentially that the estate owned this \$5,000 note. Against this there is the evidence of the respondent who testifies that the note was his, that it represented a loan made to Ochronowicz with his money; and who explained in detail how he got the money to make this loan and what the sources of his income were. He is corroborated by Ochronowicz, the man who signed the notes." (Italics his.) Thomson, the attorney for the administrator, testified, inter alia, that the respondent stated to him, after administration papers had been taken out, that the \$5,000 note was part of the assets of the estate. The respondent, in his argument, assumes this testimony "was the only direct evidence tending to show that the deceased's estate owned this note," and after citing Beninea v. Nardiello, 320 Ill. 181, 184, and several like cases, he insists that the testimony of Thomson is entitled to but little weight,

and that in view of the testimony of Ochronowicz and the respondent the finding of the trial court is against the greater weight of the evidence and should be set aside. The entire argument is based upon the unwarranted assumption that the testimony of Thomson is the only evidence tending to show that the \$5,000 note belonged to the estate. The testimony of Steven S. Tyrakowski proves conclusively that the \$5,000 note belonged to the estate. Tyrakowski is engaged in the mortgage loan and investment business and knew the deceased for a number of years. His testimony is to the following effect: In June, 1925, the deceased came to his office "and said she was going to make a mortgage and wanted to know if we could prepare the papers and negotiate the loan for her. I told her I thought we could, so she said all right, she was going to come in with the maker of the loan shortly and she did come in. Mr. Thompson (attorney for petitioner): Q. What conversation did you have when she came in? The Court: When did she come in, about? A. Some part of 1925, June. Q. Anybody with her? A. She came alone. Mr. Thompson: Q. What was the conversation? A. That is the conversation. * * * Mr. Thompson: When was the next conversation you had with her? * * * A. The latter part of June or the early part of July, 1925, when she come in. * * * Who was with her, if anybody? A. Mr. Ochronowicz. Q. Anybody else? A. No, sir. Mr. Thompson: Was that Kazmir Ochronowicz? A. Yes, sir. Q. What conversation did you have with him at that time? A. Mrs. Rybicki had introduced me to Mr. Ochronowicz and told me that was the party she was loaning the money to. So I told him then to bring his abstract over and guaranty policy, whatever he had and we would prepare the notes and have him sign the notes. It was a building loan. * * * I asked Mrs. Rybicki just about the amount of the mortgage and she said it was going to be \$6500 for a term of three years, with prepayments of \$500 every six months. * * * \$5,000

and that in view of the testimony of Gaborowicz and the respondent
the finding of the trial court is against the greater weight of the
evidence and should be set aside. The entire argument is based upon
the unwarranted assumption that the testimony of Thompson is the only
evidence tending to show that the \$2,000 note belonged to the estate.
The testimony of Steven A. Gaborowicz proves conclusively that the
\$2,000 note belonged to the estate. Gaborowicz is engaged in the
mortgage loan and investment business and knew the deceased for a
number of years. His testimony is to the following effect: In June,
1933, the deceased came to his office and said she was going to make
a mortgage and wanted to know if we could prepare the papers and
negotiate the loan for her. I told her I thought we could, so she
told all right. She was going to come in with the money of the loan
themselves and she did come in. Mr. Thompson (attorney for petitioner);
Q. That conversation did you have with her then? The Court:
Then did she come in, about a week back of 1933, June, or
anybody with her? A. She came alone. Mr. Thompson: A. That was
the conversation. Q. That is the conversation. * * * Mr. Thompson:
When was the next conversation you had with her? * * * A. The
last part of June or the early part of July, 1933, when she came
in. * * * She was with her, if anybody? A. Mr. Gaborowicz. Q.
Anybody else? A. No, sir. Mr. Thompson: Was that Steven Gaborowicz?
A. Yes, sir. Q. That conversation did you have with him at that
time? A. Yes. I think had introduced me to Mr. Gaborowicz and told
me that was the party who was loaning the money to. So I told him
then to bring his checkbook over and personally verify, whatever he had
and we would prepare the notes and have him sign the notes. It was
a \$2,000 loan. * * * I asked Mr. Gaborowicz just about the terms
of the mortgage and he said it was going to be \$200 for a term of

for three years. There were four notes executed, four principal notes, three for \$500.00 each and one for \$5,000 and the \$500.00 notes were prepayments of six months. * * * He (Ochronowicz) wasn't to receive the money - the statement by the contractor who was erecting his building was to be made and from his statement the necessary waivers for labor and material were to be made and on the sworn statements the bank was to pay same on the order of Mr. Ochronowicz. Q. At any of these conversations was Joseph Kopterski there? A. No, sir. Q. Was anything said about Joseph Kopterski having any interest in this loan? A. No, sir." The witness further testified that in his business he had safety deposit vaults and that the respondent had a box therein and the deceased was anxious to secure one but there was none available; that in January or the first part of February, 1928, the respondent was delinquent for the rental of his box and the witness then transferred that box to the deceased; that the respondent still had the right of access to that box because his name was on it; that when the deceased died in March, 1929, the respondent came to the place of business of the witness and told him that the respondent's sister had passed away and asked "to be admitted to the box;" that the witness told him that he would not allow him access to the box until the inheritance tax department gave a clearance, and the respondent asked him if it was necessary to get that clearance before the witness would admit him to the box; that the witness was present during the examination of the box by the officials of the inheritance tax department; that there was found, among other things, in the box, the Ochronowicz note for \$5,000; that as soon as the box was released by the inheritance tax department the respondent obtained access to the box. The witness further testified that he saw Ochronowicz pay each of the \$500 notes, in his office, to the deceased; that the respondent was not present on any of these

for three years. There were four notes recorded, four principal notes, three for \$200.00 each and one for \$5.00 and one \$200.00 notes were repayments of the same. He (Comptroller) hadn't to receive the money - the statement by the contractor who was erecting the building was to be made and from his statement the necessary money for labor and material was to be made and on the same statement the bank was to pay money on the order of the Comptroller. A copy of these conversations was Joseph Kaptanski's. A. No. 11. A. No. 12. A. No. 13. The witness further testified that in his opinion he had safely deposited the notes and that the respondent had a box therein and the deceased was unable to secure one but there was none available; that in January or the first part of February, 1932, the respondent was defendant for the rental of his box and the witness then transferred that box to the deceased; that the respondent still had the right of access to that box because his name was on it; that when the deceased died in March, 1932, the respondent came to the place of business of the witness and told him that the respondent's master had passed away and asked "to be admitted to the box"; that the witness told him that he would not allow him access to the box until the inheritance tax department gave a clearance, and the respondent asked him if it was necessary for that clearance before the witness would admit him to the box; that the witness was present during the examination of the box by the officials of the inheritance tax department; that there was found, among other things, in the box, the respondent's note for \$5,000; that on March 21 the box was released by the inheritance tax department; that the respondent obtained access to the box. The witness further testified that he saw Comptroller pay each of the four notes, in his office, on the deceased; that the respondent was not present on any of these

occasions; that the respondent never told him that he had any interest in the note nor did Ochronowicz ever make any statement indicating that he understood that the respondent had any interest in the notes, nor did the deceased ever make any statement to him to the effect that the respondent had any interest in the notes; that in July, 1928, Ochronowicz was unable to pay the \$5,000 note and the deceased told the witness that she had agreed with Ochronowicz to extend it and she wished the witness to prepare the necessary extension papers, which he did; that all of the interest payments were paid by Ochronowicz to the deceased in his office and the respondent was never present on any of the occasions to which the witness had testified; that at the time the loan was made the deceased handed the \$6,500 to the witness and the latter gave her the notes; that shortly after the respondent obtained access to the box he came to the witness and asked him if he knew that the \$5,000 note that was in the box belonged to him, to which the witness answered that he did not know any such thing; that the respondent thereupon said "it might have belonged to him, that I (Tyraowski) didn't know that a brother and sister may carry on a business deal other people don't know about;" that thereupon the witness said that if the respondent was the owner of the note it was "too bad" he did not make a claim for it when the inheritance tax department official examined the box.

The extension agreement was for three years and was executed in July, 1928, and was signed by the deceased, Ochronowicz, and his wife. It recites that Wladyslaw Rybicki is the legal holder and owner of this note, etc., and that the Ochronowiczes desired to have the note extended, etc. We have carefully examined the testimony of the respondent in respect to his alleged ownership of the note

accountant that the respondent never told him that he had any interest in the wife nor did he ever make any statement indicating that he had any interest in the respondent and any interest in the notes, nor did he ever make any statement to him to the effect that the respondent had any interest in the notes; that in July, 1935, respondent was unable to pay the \$5,000 note and the document told the witness that she had agreed with respondent to extend it and she asked the witness to prepare the necessary extension papers, which he did; that all of the interest payments were paid by respondent to the document in his office and the respondent was never present on any of the occasions to which the witness had testified; that at the time the loan was made the document handed the \$5,000 to the witness and the latter gave her the note; that shortly after the respondent obtained access to the box he came to the witness and asked him if he knew that the \$5,000 note that was in the box belonged to him, to which the witness answered that he did not know any such thing; that the respondent thereupon said "it might have belonged to me, that I (Tyrolowski) didn't know that a brother and sister may carry on a business deal where people don't know about"; that thereupon the witness told him that if the respondent was the owner of the note it was "too bad", he did not make a claim for it when the respondent's law department official examined the bank.

The extension agreement was for three years and was executed in July, 1935, and was signed by the document, respondent, and his wife. It recited that respondent Tyrolowski is the legal holder and owner of this note, \$5,000, and that the respondent desired to have the note extended, etc. It was carefully examined the testimony of the respondent in regard to his alleged ownership of the note

and we are satisfied that the trial court was fully justified in refusing to believe his testimony. It is a circumstance pregnant with force that the attorney who tried the case for the respondent, at the conclusion of the evidence, stated to the court that he would not ask the court to believe anything that the respondent had stated in reference to the assets of the estate. It is true that Ochronowicz, a saloon-keeper and friend of the respondent, testified that the deceased told him that \$1,500 of the loan belonged to her and that the remaining \$5,000 belonged to her brother, the respondent. But the acts of Ochronowicz, even according to his own testimony, prove conclusively that during the lifetime of the deceased he treated her as the sole owner of all the notes connected with the loan. Moreover, John Rybicki, the administrator of the estate, and Pearl Rybicki, his daughter, testified that after the death of the deceased Ochronowicz stated to them that he owed the \$5,000 note to the deceased. Moreover, the testimony of Tyrakowski clearly proves that Ochronowicz, during the lifetime of the deceased, always recognized her as the sole owner of the note. The trial court was fully justified in believing that Ochronowicz conspired with the respondent to defraud the estate and that in the event that the respondent should be found to be the owner of the note Ochronowicz would profit substantially thereby, at the expense of the two children. The deceased trusted Tyrakowski and had him arrange all the details of her business affairs, and if the respondent had any interest in the \$5,000 note it is strange, indeed, that she did not make that fact known to him. The respondent first asserted his claim of ownership of the note after the death of Mrs. Rybicki and after he had abstracted the note from her box.

As to the contention that the court erred in admitting incompetent evidence on behalf of the petitioner, the evidence in

question may be briefly stated as follows: Thomson, the attorney for the estate, testified that the respondent came to his office and presented to him a note for \$1,000, purporting to have been signed by the deceased and payable to one Stanley Wroblewski; and also two other notes, both purporting to have been signed by the deceased, and payable to the respondent, one in the sum of \$2,500 and the other in the sum of \$3,500; that the respondent said "he had all these cases in his control and would settle them for \$7,000 - he to keep the \$5,000 Ochrowski note, \$5,000 and me to pay him \$2,000 out of which he would pay me back \$500;" that his father had a claim against the estate for \$1,500 and that he would give his father \$200 in settlement of the claim and send him back to Europe; that Wroblewski would take \$100 for his \$1,000 note. Milton Cohen testified that he was the attorney for the respondent in February, 1930, and that the respondent left with him the three notes about which Thomson testified and that the witness presented them for collection to the attorney for the administrator. Howard A. Rounds, a handwriting expert, testified that what purported to be the signatures of the deceased to the three notes were forgeries. We may add, at this point, that Mr. Rounds examined the notes and rendered his opinion in respect to the same at the request of Mr. Cohen and Mr. Thomson, who each paid one-half of his bill. The respondent contends that the introduction of the aforesaid evidence of Thomson, Cohen and Rounds "raised an issue collateral to that under investigation here, and that it should have been excluded." It is a sufficient answer to this contention to say that all of the aforesaid evidence of Thomson, Cohen and Rounds was admitted without objection by the respondent. The first objection made by him to evidence bearing upon the three notes was when the petitioner, after the three witnesses had given the aforesaid testimony, offered them in evidence.

question may be briefly stated as follows: Thomas, the attorney for the estate, testified that the respondent came to his office and presented to him a note for \$1,000, purporting to have been signed by the deceased and payable to one Stanley Franklin; and also two other notes, both purporting to have been signed by the deceased, and payable to the respondent, one in the sum of \$1,200 and the other in the sum of \$1,500; that the respondent said "he had all these notes in his control and would settle them for \$7,000 - no to keep the \$2,000 Commissioner's note, \$5,000 and he to pay him \$2,000 out of which he would pay me back \$500"; that the latter had a claim against the estate for \$1,500 and that he would give him \$1,000 in settlement of his claim and send him back to "proper" that respondent would take \$100 for his \$1,000 note. Milton Cohen testified that he was the attorney for the respondent in February, 1920, and that the respondent told him the three notes about which Thomas testified and that the witness recollects them for delivery to the attorney for the respondent. Edward A. Bonds, a handwriting expert, testified that what purported to be the signatures of the deceased to the three notes were forgeries. He may add, at this point, that Mr. Bonds examined the notes and rendered his opinion in regard to the same at the request of Mr. Cohen and Mr. Thomas, who each paid one-half of his bill. The respondent contends that the fabrication of the above evidence of Thomas, Cohen and Bonds "raised a strong suspicion to the writer investigation note, and that it should have been excluded." It is a sufficient answer to this contention to say that all of the above evidence of Thomas, Cohen and Bonds was admitted without objection by the respondent. The first objection made by him to evidence bearing upon the three notes was when the petitioner, after the same were introduced, gave the following testimony, offered them in evidence:

Then, for the first time, the respondent raised the objection that the notes were incompetent and immaterial, but the specific objection now raised that such evidence raised a collateral issue was not urged. At the time the notes were offered the entire history in respect to them was before the court, and the mere introduction of the notes did not add anything new to the testimony. Moreover, we are not prepared to hold that the introduction of the evidence, even if it had been objected to, would constitute error, for the reason that it clearly appears that the respondent was engaged in a general scheme to defraud the estate, and that his claim of ownership of the \$5,000 note was but a part of the scheme. However, we do not deem it necessary to pass upon the question as to whether the evidence bearing upon the notes would have been competent had objection been made to the same.

Mrs. Rybicki had just died when the respondent appeared at her apartment, ransacked the same, and took away money and personal property belonging to her. He then petitioned the Probate court to be appointed administrator of the estate, but the petition was denied. He next appeared as a witness for Daniels, against whom the estate held two \$5,000 notes, secured by a trust deed, and it would appear from the record that it was through his testimony that Daniels was able to defeat the claim of the estate as to one of the two notes. He next claimed to be the owner of two of the three forged notes, and he turned over to Attorney Cohen the three notes for collection against the estate. That these notes were forged is not disputed. In fact, his counsel, during the trial, admitted that they were forged. During the cross-examination of the respondent, he was driven to the position where he denied that he employed Mr. Cohen as a lawyer or that he ever turned over any of the forged notes to him for collection. One of the forged notes was

them, for the first time, the respondent raised the objection that the notes were counterfeit and invalid, but the specific objection now raised that such evidence raised a collateral issue was not urged. At the time the notes were offered the entire history in respect to them was before the court, and the introduction of the notes did not require him to the testimony. Moreover, we are not prepared to hold that the introduction of the evidence, even if it had been objected to, would constitute error. For the reason that it clearly appears that the respondent was engaged in a general scheme to defraud the estate, and that his claim of ownership of the \$2,000 note was but a part of the scheme. However, we do not deem it necessary to pass upon the question as to whether the evidence bearing upon the notes would have been competent had objection been made to the same.

Mr. Lyford did not file when the respondent appeared at her apartment, transferred the notes, and took away money and personal property belonging to her. He then petitioned the probate court to be appointed administrator of the estate, but his petition was denied. He next appeared as a witness for Daniel, against whom the estate had two \$2,000 notes, secured by a trust deed, and it would appear from the record that it was through his testimony that Daniel was able to defeat the claim of the estate as to one of the two notes. He next claimed to be the owner of two of the three forged notes, and he turned over to Attorney Cohen the three notes for collection against the estate. That these notes were forged is not disputed. In fact, his counsel, during the trial, admitted that they were forged. During the cross-examination of the respondent, he was driven to the position where he testified that he employed Mr. Cohen as a lawyer and that he even turned over any of the forged notes to him for collection. One of the forged notes was

made payable to Stanley Wroblewski, a friend and room mate of the respondent. Upon the cross-examination of the respondent he admitted that in his testimony in the Daniels case he stated that he had no claims against the estate.

If the claim of the respondent were allowed, no estate would be safe from dishonest claimants. The attorney for the respondent, at the conclusion of all the evidence, was apparently so impressed with the dishonesty of the instant claim that he made a motion to dismiss the respondent's appeal from the Probate court order. (See the order entered by the Circuit court, which is heretofore cited in this opinion.) The motion to dismiss was denied by the court for the reason that the order entered by the Probate court applied only to the \$5,000 note, whereas the order entered by the Circuit court applies also to other property.

The judgment of the Circuit court of Cook county should be and it is affirmed.

AFFIRMED.

Gridley, P. J., and Kerner, J., concur.

that payable to the order of the respondent and known as the
the respondent. Upon the production of the respondent he
admitted that in his testimony in the United States he stated
that he had no claim against the estate.
It is the claim of the respondent and witness, he said to
would be paid from the estate of the respondent. The attorney for the
respondent, at the conclusion of all the evidence, was apparently
no agreement with the testimony of the witness claim that he
made a motion to dismiss the respondent's appeal from the referee
could order. (See the order entered by the Circuit court, which
is heretofore cited in this opinion.) The motion to dismiss
was denied by the court for the reason that the order entered by
the referee court applied only to the \$1,000 note, whereas the
order entered by the Circuit court applied also to other property.
The judgment of the Circuit court of Cook county should
be and it is affirmed.

IT IS ORDERED.

GRIDLEY, P. J., and KERNER, J., concur.

35437

ARTHUR V. GOMBEL and
EDWARD SCHATZ,
Appellees,

v.

DAVID LIPMAN,
Appellant.

417
APPEAL FROM SUPERIOR
COURT, COOK COUNTY.

265 I.A. 601⁴

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

This was an action in trespass. There was a trial before the court, with a jury, and a verdict returned finding the defendant guilty and assessing the plaintiffs' damages at the sum of \$6,000. Judgment was entered upon the verdict and the defendant has appealed.

The declaration consisted of three counts but the first was dismissed by the plaintiffs. The second count alleges that on May 12, 1930, the defendant, with force and arms, etc., wilfully, wantonly and maliciously broke and entered a certain office and business of the plaintiffs situated at "1325-1327-1329 Burnham Building, 160 North LaSalle Street, Chicago, Cook County, Illinois, and then and there wilfully, wantonly and maliciously changed the locks on all of the doors entering said office, so that plaintiffs could not re-enter therein, and also at the time aforesaid, on to-wit: the 12th day of May, A. D. 1930, with force and arms, etc., wilfully, wantonly and maliciously seized, took and detained divers goods and chattels, to-wit: personal property consisting of furniture, furnishings, carpeting, books, bookcases, chairs, records, desks, files, typewriters, books of account, and all other property of plaintiffs including property belonging to the Apartment House and Hotel Association, Inc., an Illinois corporation, with capital

ARTHUR V. GORMAN and
EDWARD ROBERTS,
Appellants.

v.
DAVID LILIAN,
Appellee.

APPEAL FROM DECISION
COURT, COOK COUNTY.

265 I.A. 601

THE JUSTICE COURT IN THE OPINION OF THE COURT.

This was an action in damages. There was a trial before the court, with a jury, and a verdict returned finding the defendant guilty and assessing the plaintiff's damages at the sum of \$6,000. Judgment was entered upon the verdict and the defendant has appealed.

The decision consisted of three counts but the first was dismissed by the plaintiff. The second count alleged that on May 12, 1930, the defendant, with force and arms, unlawfully, wantonly and maliciously broke and entered a certain office and business of the plaintiff situated at "1232-1237-1238" Madison Building, 100 North LaSalle Street, Chicago, Cook County, Illinois, and then there unlawfully, wantonly and maliciously changed the locks on all of the doors entering said office, so that plaintiff could not re-enter therein, and also at the time aforcited, on to-wit: the 12th day of May, A. D. 1930, with force and arms, etc., unlawfully, wantonly and maliciously seized, took and detained diverse goods and chattels, to-wit: personal property consisting of furniture, furnishings, carpets, books, bookcases, chairs, records, desks, files, typewriters, books of account, and all other property of plaintiff including property belonging to the Apartment House and Hotel Association, Inc., an Illinois corporation, with capital

stock of \$5,000, which is owned by the plaintiffs herein, including all cuts, right, and advertising contracts belonging to said Apartment House & Hotel Association, and all other property, of whatever kind and description, belonging to said plaintiffs and which were in any way connected with the said Association and said law business, said personal property and business, as aforesaid, being in said office and being of the value of \$12,500, and that the defendant with force and arms, willfully, wantonly and maliciously took and detained the same and converted them and disposed of the same thereof to his own use, * * * by means of which several premises the plaintiffs have been deprived of their property, office and business and the possession of same, and also the plaintiffs have and are now prevented from transacting therein their lawful and necessary affairs and business, and other wrongs to the plaintiffs * * * to the damage of the plaintiffs in the sum of \$50,000." The third count alleges that on May 12, 1930, the defendant "with force and arms, etc., broke and entered a certain office and business of the plaintiffs, (here follows a description of the same) and then and there expelled and amoved the plaintiffs from the possession, use, occupation and enjoyment of the last named office and business, and kept and continued them so expelled and amoved for a long space of time, to-wit: from thence hitherto, whereby the plaintiffs all this time have lost and were deprived of the use and benefit of their last mentioned office and business, and that by reason of the said willful, wanton and malicious act of the defendant, the said business and office has been wholly destroyed and is of no value to the plaintiffs; and other wrongs to the plaintiffs * * * to the damage of the plaintiffs in the sum of \$50,000, * * *."

The defendant filed a plea of not guilty and also two special pleas. The first special plea is a plea of son assault

The defendant filed a plea of not guilty and also two special pleas. The first special plea is a plea of non est.

The damages of the plaintiff in the sum of \$20,000. * * *

* * * to the plaintiff; and other wrongs to the plaintiff * * *

business and office has been wholly destroyed and is of no value

said willful, wanton and malicious act of the defendant, the said

their last mentioned office was unknown, and that by reason of the

this time have lost the benefit of the use and benefit of

of time, to-wit: from the date hereafter, whereby the plaintiff and

and kept and continue them so expelled and removed for a long space

use, occupation and enjoyment of the last named office and business,

and there expelled and removed the plaintiff from the possession,

the plaintiff. (here follows a description of the same) and then

and arms, etc., broke and entered a certain office and business of

third count alleges that on May 18, 1935, the defendant "with force

* * * to the damage of the plaintiff in the sum of \$20,000." The

two nearly entire and business, and other wrongs to the plaintiff

and are now prevented from transacting therein their lawful and

business and the possession of same, and also the plaintiff have

the plaintiff have been deprived of their property, office and

were exposed to his own loss. * * * by means of which several premises

ly took and obtained the same and converted them and disposed of the

the defendant with force and arms, willfully, wantonly and malicious-

being in said office and being of the value of \$20,000, and thus

new business, said personal property and business, as aforesaid,

which were in any way connected with the said association and said

whatsoever kind and description, belonging to said plaintiff and

Apartment House & Hotel Association, and all other property, of

All rents, rights, and existing contracts belonging to said

stock of \$5,000, which is owned by the plaintiff herein, including

demeanor. The second alleges "that the plaintiff ought not to have his aforesaid action against him," "because he says, that on, to-wit: the 12th day of May, A. D. 1930, he admits entering into possession of the premises known as 1325-27-29 Burnham Building, but denies that such entry was unlawful, and denies that he unlawfully took and detained divers goods and chattels, to-wit: personal property consisting of furniture, furnishings, carpeting, books, chairs, records, desks, files, typewriters, etc., but alleges that on the aforementioned date, the property described in the plaintiffs' declaration did not belong to the plaintiffs but was the property of the defendant and the Apartment House and Hotel Association, a corporation, and this the defendant is ready to verify; wherefore he prays judgment if the plaintiffs ought to have their aforesaid action against him, etc." The plaintiffs filed replications to the three pleas.

The plaintiffs and the defendant were attorneys at law. On November 21, 1929, they entered into the following agreement:

"This agreement entered into by and between David Lipman, hereinafter designated as first party and Arthur V. Goebel and Edward Schatz, hereinafter designated as second party, all of the City of Chicago, Cook County, Illinois;

WITNESSETH:

WHEREAS, first party has agreed to sell and deliver unto the second party his law business, accounts receivable, choses in action, divers items of personal property and other goods and chattels as hereinafter enumerated, and

WHEREAS, second party has agreed to purchase the same at the price and upon the terms as herein stated,

NOW THEREFORE, for One (\$1.00) Dollar and other goods and valuable considerations, the receipt whereof is hereby acknowledged by each of the parties hereto, one unto the other, and of the performance of the covenants and conditions hereinafter set forth, and the mutual execution of these presents, it is hereby agreed:

1. First party does hereby agree to and does hereby sell, transfer and convey unto second party, at the price of \$12,500.00, all of the following:

A. Capital stock issued and outstanding of the shares of the Apartment House and Hotel Association, Inc., an Illinois Corporation amounting to \$5000.00.

damages. The second allegation that the plaintiff ought not to have his attorney's action against him, "because he says that on, to-wit: the 15th day of May, A. D. 1930, he admits entering

into possession of the premises known as 1328-27-28 Winham Building, but denies that such entry was unlawful, and denies that he unlawfully took and detained diverse goods and chattels, to-wit: personal property consisting of furniture, furnishings, carpeting, book, charts, records, desks, files, typewriters, etc., but alleges that on the aforementioned date, the property described in the plaintiff's declaration did not belong to the plaintiff but was the property of the defendant and the Apartment House and Hotel Association, a corporation, and that the defendant is ready to verify wherever he pays judgment if the plaintiff ought to have their former action against him, etc." The plaintiff filed

rejoinders to the three pleas.

The plaintiff and the defendant were attorneys at law.

On November 21, 1932, they entered into the following agreement:

"This agreement entered into by and between David L. Harnett, hereinafter designated as first party and Arthur V. Goodell and Edward J. Gahan, hereinafter designated as second party, all of the City of Chicago, Cook County, Illinois:

WITNESSETH:

THAT, first party has agreed to sell and deliver unto the second party his law business, accounts receivable, choses in action, diverse items of personal property and other goods and chattels as hereinafter enumerated, and

THAT, second party has agreed to purchase the same at the price and upon the terms as herein stated.

NOW THEREFORE, for the (\$100) dollar and other goods and valuable considerations, as recited above, in money acknowledged by each of the parties hereto, and with the other, and of the performance of the covenants and conditions hereinafter set forth, and the actual execution of these premises, it is hereby agreed:

1. That party does hereby agree to and does hereby sell, transfer and convey unto second party, at the price of \$12,500.00, all of the following:

A. Capital stock owned and outstanding of the shares of the Apartment House and Hotel Association, Inc., an

B. Property of said association consisting of furniture, furnishings, carpeting, books, bookcases, chairs, records, desks, files, typewriters and all other property belonging to said association, including all cuts, rights and advertising contracts inuring to the Apartment House and Hotel Guide, and membership applications and accounts receivable of said Apartment House and Hotel Association, except advertising accounts receivable.

C. Assignment of lease to suite of offices No. 1325-1327-1329 Burnham Building, 160 N. LaSalle Street.

D. Law business of said first party, including outstanding fees on pending business, excluding however, all accounts receivable for work heretofore completed, a copy of which is hereto attached marked Schedule A, and cases or claims in which first party has an interest as plaintiff or defendant.

E. Right to share to the extent of fifty percent of the net profits in Room and Apartment Registry, if, as and when the same may be organized, and operated by said first party.

F. All other property of whatever kind and description belonging to said Apartment House and Hotel Association and said David Lipman, incident to or in any way connected with the business of said Association and said law business.

2. Second party shall pay unto first party the sum of \$1000.00, as earnest money, upon the execution hereof, the receipt whereof is hereby acknowledged and the balance of \$11,500.00 as follows:

\$2500.00	December	1, 1929
500.00	May	1, 1930
500.00	August	1, 1930
500.00	November	1, 1930
500.00	February	1, 1931
500.00	May	1, 1931
500.00	August	1, 1931
500.00	November	1, 1931
500.00	February	1, 1932
500.00	May	1, 1932
500.00	August	1, 1932
500.00	November	1, 1932
500.00	February	1, 1933
550.00	May	1, 1933
550.00	August	1, 1933
550.00	November	1, 1933
550.00	February	1, 1934

3. The foregoing indebtedness shall be evidenced by sixteen principal promissory notes in the respective amounts and due dates as herein provided, with interest at 6% per annum, after maturity of each of said notes; and it is expressly agreed by the party of the first part that the said notes shall not be negotiated nor discounted, but shall be held by first party until the maturity of the notes bearing date of February 1st, 1934, and first party further agrees not to sue upon, or prosecute any suit at law or in

equity, upon default in payment of any of said notes conditioned, as aforesaid, until default in payment of note due and payable on February 1st, 1934; provided however, that in the event second party shall not pay said notes on the respective dates of maturity, first party shall have the right and second party expressly gives first party the right to enter the premises, by his agents or attorneys, and to examine all books, ledgers and other records in the possession of second party in which any or all accounts received or receivable, or moneys had and received by said second party, by or through the memberships in the Apartment House and Hotel Association, or from the law practice of second party are recorded, and if from such inspection and audit of said records, it appears that the gross monthly income from all sources exceeds the sum of \$650.00, then in that event first party shall have the right to receive forthwith the amounts in excess of the sum of \$650.00 for any calendar month aforesaid and shall also have the right to sue at law or in equity and prosecute such suit or suits to judgment; and provided further that notwithstanding anything to the contrary appearing herein, second party shall at no time be excused from making payment of not less than one-fourth of the amount of the respective notes, as the same become due from time to time, the balance, if any, to become due and payable, cumulatively, on or before February 1, 1934.

4. It is further mutually understood that in the event the overhead expense of operating the said business, herein sold and transferred by first party to second party after deducting certain income and rentals received from sub-tenants occupying offices in said suite shall be fixed at the sum of \$400.00 and if said amount so fixed shall be reduced, that is to say, shall be less than \$400.00 for any calendar month, then the aforementioned sum of \$650.00 shall likewise be reduced in the same amount and in proportion thereto.

5. The provisions directly above, being Paragraphs three and four thereof, are further conditioned upon, and subject to the payment by second party of all running expenses incident to the operation of said business not more than Ten days after the same become due, including such items of expense as rent, cost of publishing and distributing of Apartment House and Hotel Guide, salaries, telephone and any and all expenses necessary or incident to the operation of said business.

6. First party shall remain in said offices and direct the work of said business and instruct the said second party in and about the duties appertaining thereto, and the conduct thereof for a period of not less than thirty days, for which the said first party shall be compensated to the extent of seventy-five percent of the net income accruing during said period remaining after deduction of rent, salaries and operating expenses.

7. Second party shall further agree to publish Apartment House and Hotel Guide bi-monthly, and to distribute the same among members of the Apartment House and Hotel Association, as part of the contract of membership between said members and said association, and to also carry out and perform said contract of membership in all other respects with each and every member of said association during the period covered by the membership of such members as appears from the records of said association, and to keep and maintain the membership lists, prospect files and other records constantly up to date.

[illegible]

4. If a taxpayer voluntarily and timely paid in full the overhead expense of providing the said business, herein called the "overhead expense," by first paying a second party after deducting certain income tax credits received from such parties concerning allocations in which said shall be limited at the sum of \$400.00 and if said amount as it may be reduced, that in no way, shall be less than \$400.00, for any calendar month, then the aforementioned sum of \$400.00 shall likewise be reduced in the same amount and proportion hereafter.

2. The provisions directly above, being paragraph three and four listed, are further subdivided upon, and subject to the payment by account party of all traveling expenses incident to the operation of said business not later than ten days after the same become due, including all items of expense as rent of telephone and the following of payments from hotel bills, salaries, telephone and any and all separate necessary or incident to the operation of said business.

6. First party shall remain in good offices and direct the work of all branches and institutes the said second party in and about the entire operation of the project, and the second party for a period of one hundred thirty days, for which the said first party shall be compensated to the extent of twenty-five percent of the net income resulting from the sale of the product after deduction of all expenses related and operating expenses.

[illegible]

8. Second party shall and does hereby also agree to prosecute with despatch all of the business relating to the clients of said first party, whether now pending or which may subsequently be handled by said second party, and said first party shall incident to the proper handling of said matters explain the contents of files in said office as the same may be requested by said second party, and further to aid said second party in every way possible upon any matter appertaining to the business of said clients; that upon all pending legal matters and for a period of six months from December 1st, 1929, the letter heads of said first party and his name shall be used in the conduct of all law business; whether pending in the courts or otherwise, and thereafter substitution of the second party for the first party as attorneys and solicitors shall become effective.

9. First party shall by his power of attorney duly execute confer upon second party the power and authority to receive and endorse all checks made payable to first party paid on account of outstanding fees due on pending and new law business; and in the event of receipt by second party of any moneys due first party as set out in Schedule A and other remittances in which first party may have an interest, particularly excluding however balance of fees due on pending and new law business, said second party shall turn over and deliver such remittances to first party.

10. Said first party shall aid second party in the publication of said magazine by submission of articles suitable for the use thereof by such publication for the period of one year from December 1st, 1929, and that any announcements in said magazine with reference to the change of the position held by said first party, as general counsel of said association shall first be approved by said first party, and it is further understood that second party shall perform no act by reason whereof the name of first party shall be removed from the bulletin board in the lobby of said building and upon the doors of said suite of offices until the unpaid balance has been reduced to twenty-five percent thereof, and in any event shall continue to remain thereon without any change for not less than one year from December 1st, 1929.

11. This agreement and any interest in and to said property of said association and said first party shall not be assigned, sold, bartered, pledged, transferred, exchanged, or in any way disposed of without the written consent and approval of said first party, so long as the unpaid balance exceeds twenty-five percent thereof.

12. Said first party does hereby covenant not to enter into any business that may be regarded as competitive to the business conducted by said association for a period of five years and not to engage in the practice of law in the City of Chicago, for the period of three years from the date hereof, except in the Federal Courts and cases where said first party is plaintiff or defendant, nor to make use of the files or records of said association or said law business, that shall or may in any way interfere with the proper conduct of the said business, or effect the profits thereof.

13. To secure the payment of the foregoing balance due under the terms thereof, it is hereby agreed that the said shares of the capital stock of said association, lease to said offices and documents of title appertaining to all of the property herein

transferred, sold and delivered shall be deposited in escrow with the directions to such escrowee to deliver the same over unto second party upon the payment of said purchase price, or in the event of default of the terms hereof, then upon notice by first party, specifying such default, said escrowee shall turn over and deliver the same to said first party, or his agent.

IN WITNESS WHEREOF the parties hereto have hereunto set their hands and seals this 21st day of November, A. D. 1929.

DAVID LIPMAN (SEAL)

ARTHUR V. GOEBEL (SEAL)

EDWARD SCHATZ (SEAL)"

It was again conceded during the trial that clause 13 of the agreement was waived by the parties. It was also conceded that the plaintiffs paid \$1,000 as earnest money and the first payment of \$2,500, and that they went into possession of the premises on December 5, 1929, and remained in possession until May 12, 1930. The evidence for the plaintiffs shows that on Monday morning, May 12, 1930, the defendant, accompanied by one Applebaum, entered the premises; that a few minutes later the plaintiff Goebel entered and the defendant stated to him, "I have taken possession of this place;" that Goebel then said, "By what authority," and he then started to walk into his private office. Goebel testified: "I walked toward the open door where Mr. Lipman was standing, to go through that door, and Mr. Lipman had his arm stretched straight out from his shoulder, resting against the side of the door, that is, the opening of the door, and he blocked my passageway, and the next - as I arrived directly in front of him, I suddenly found somebody on my back; and when I turned around, I found myself in a struggle with the same man that was sitting in that chair in the reception room, and both he and Mr. Lipman assaulted me. * * * They both struck me with their fists. After I had untangled myself from the two of them, I backed up toward the door leading to the corridor in the building, and this other man - I had my fist clinched, and

transferred, said and delivered shall be deposited in some safe the defendant is each evidence of delivery in some cover and second party upon the payment of said purchase price, or in the event of default of the same, then upon notice by first party, specifying such default, said evidence shall turn over and deliver the same to a first party, or his agent.

It is further shown the parties hereto have heretofore of their hands and seals this 1st day of November, 1937.

(SIGNED)

(SIGNED)

(SIGNED)

It was again conducted during the trial that change is of

the agreement was waived by the parties. It was also conceded that the plaintiff paid \$1,000 as earnest money and the first payment of

\$2,500, and that they went into possession of the premises on

December 8, 1937, and remained in possession until May 12, 1938.

The witness for the defendant testified that on Monday morning, May 12,

1938, the defendant, accompanied by one applicant, entered the

premises; that a few minutes later the plaintiff's agent entered

and the defendant stated to him, "I have taken possession of this

place;" that looked upon him, "By what authority?" and he then

started to walk into the private office. Called testified: "I

walked toward the open door where Mr. Lipman was standing, he ran

through the door, and Mr. Lipman had his arm stretched across

out from his shoulder, reaching against the side of the door, that

is, the opening of the door, and he blocked my passageway, and the

next - as I arrived directly in front of him, I suddenly found

somebody on my back; and when I turned around, I found myself in a

struggle with the man who was sitting in that chair in the

reception room, and both he and Mr. Lipman assaulted me." They

both struck me with their fists. After I had untangled myself from

the two of them, I picked up toward the door leading to the corridor

in the hall, and this other man - I had up the climbed, and

this other man asked me why I had my fist clinched, asked me if I had enough, if I wanted any more. I didn't say anything. * * * I didn't say anything further, but walked out in the corridor and went down in the lobby of the building. * * * He (the defendant) grabbed me and held me while this man pounced on me from behind. * * * I certainly lunged after I was struck from behind. * * * Because Mr. Lipman was one of the men that was striking me at that time. * * * He held me while the other man pounced on my back." The plaintiff Schatz testified that as he entered the premises he found the plaintiff Goebel and a stranger in the premises; that the defendant approached him with his coat off and his sleeves rolled up, and said: "Schatz, I have taken possession of the premises, and I hope we won't have to come to fist fights, as I did with Mr. Goebel," to which the witness replied: "Well, of course there is no use resisting you, as much as you have some reinforcements." The witness further testified: "I said, 'Now, Mr. Lipman, that was a rather low way of dispossessing us.' He said, 'I have a right to do it under the contract.' I said, 'I don't think you did.' He said, 'Well, I have plenty of time to fight my cases, you can go ahead and do whatever you want.' * * * Well, I said, 'I didn't like the way you came in the premises;' and he said, 'That is the only way.' He said, 'You know if I went to court, you know how long it would take me to take the premises back.' He said, 'I can't be bothered; I think I have a right under the contract to take it.' He said, 'I would like to adjust it if I can, but if you boys are going to be unreasonable, I can't help that.' He said, 'I have all the time to fight these cases.'" It is conceded that the defendant took possession of the premises, personal property and the business on May 12, 1930, and that he retained possession thereafter. The defendant's second special plea admits that he took possession of the premises, etc.,

This other man asked me why I had not left the witness stand, asked me if
 I had enough, if I wanted any more. I didn't say anything. * * *
 I didn't say anything further. I was asked why in the morning and
 went down in the lobby of the building. * * * He (the defendant)
 grabbed me and held me while this was going on in the lobby.
 * * * I certainly knew after I was shown from behind. * * *
 because Mr. Lippman was one of the men that was asking me at that
 time. * * * He held me while the other man pointed at my back.
 The plaintiff's expert testified that as he entered the premises he
 found the plaintiff's coat and a sweater in the premises; that the
 defendant approached him with his coat off and his sleeves rolled
 up, and said: "Son-of-a-bitch, I have taken possession of the premises, and
 I hope we won't have to come to that fight, as I did with Mr. Goober."
 to which the witness replied: "Well, if anyone takes it he has
 taken it, you know as you have some reinforcements." The witness
 further testified: "I saw, saw, Mr. Lippman, that was a rather low
 way of disposing of it." He said: "I have a right to do it under the
 contract." I said: "I don't think you did." He said: "Well, I have
 plenty of time to fight my case, you can go ahead and do whatever you
 want." * * * Well, I said: "I didn't like the way you came in the
 premises; and he said: 'That is the only way.' He said: 'You
 know if I want to come, you know how long it would take me to take
 the premises back.' He said: 'I don't see why not; I think I have a
 right under the contract to take it.' He said: 'I would like to
 adjust it if I want, but if you want to go to the courthouse, I
 can't help that.' He said: 'I have all the time to fight your
 case.' It is contended that the defendant took possession of the
 premises, personal property and the business on July 12, 1937, and
 that he retained possession thereafter. The defendant's second
 expert also testified that he took possession of the premises, etc.

on May 12, 1930. His evidence clearly shows that he did so. He attempted to prove that the physical force he and Applebaum used against Goebel was made necessary by the fact that the latter resisted them, and that the defendant and Applebaum acted in self-defense. The jury did not believe this testimony of the defendant and we are in entire accord with their finding in that regard. In any event, the plaintiff Goebel had a right to defend the possession of the plaintiffs. The court asked the defendant to state under what clause of the contract he claimed the right to take possession of the property, to which the defendant answered that he based his right to enter and take possession of the property under clause three of the contract. The court very properly ruled that that clause gave the defendant only the right to enter for the purpose of making an examination or audit of the accounts and that it did not give the defendant the right to enter and take possession of the premises, etc. The court, in passing upon the defendant's motion to direct a verdict at the conclusion of the plaintiffs' case, properly held that if the defendant thought the plaintiffs had breached the contract, he had no right to obtain possession of the premises, etc., through illegal procedure, and that the plaintiffs had a right to defend their possession. At no time during the trial did the defendant assert that the contract was a conditional sale contract. In this court, however, he contends that "this agreement amounted to a 'conditional sale' and therefore the lease of the premises, the stock and the chattels were the property of the defendant and the Apartment House and Hotel Association until fully paid for," and that after the plaintiffs had defaulted under the contract he served a notice on them setting up the default and demanding possession of the premises, that the plaintiffs refused to

on May 19, 1910. His evidence clearly shows that he did so. He attempted to prove that the plaintiff knew he and his partner used against Vogel was made necessary by the fact that the latter resisted them, and that the defendant and his partner acted in self-defense. The jury did not believe this testimony of the defendant and we are in entire accord with their finding in this regard. In any event, the plaintiff Vogel had a right to defend his possession of the plaintiff's. The court ruled the defendant to state under what circumstances of the tenor he claimed the right to take possession of the property. He stated the defendant answered that he had his right to enter and take possession of the property under circumstances of the conflict. The court very properly ruled that the defendant gave the defendant only the right to enter for the purpose of making an examination or audit of the accounts and that it did not give the defendant the right to enter and take possession of the premises, etc. The court, in passing upon the defendant's motion to direct a verdict at the conclusion of the plaintiff's case, properly held that if the defendant thought the plaintiff had procured the contract, he had no right to obtain possession of the premises, etc., through illegal procedure, and that the plaintiff had a right to defend such possession. At no time during the trial did the defendant assert that the contract was a conditional sale contract. In this court, however, he contends that "this agreement amounted to a 'conditional sale' and therefore the issue of the premises, the stock and the fixtures were the property of the defendant and the apartment house and Hotel Association until fully paid for," and that after the plaintiff had defaulted under the contract he served a notice on them seeking up the default and re-taking possession of the premises, that the plaintiff's refusal to

surrender possession and that thereupon the defendant had the right to take possession of the premises, etc. Under the rules we might well disregard the contention now raised in this court that the agreement amounted to a conditional sale contract. The defendant states, in support of the instant contention, that the contract provides only that the defendant "has agreed to sell and deliver unto the second parties, Goebel and Schatz, his law business," etc., whereas it provides that the defendant "does hereby sell, transfer and convey unto said second party, at the price of \$12,500 all of the following," which are words of present, absolute conveyance. The plaintiffs contend, and with justification, we regret to state, that the defendant, in his argument, has repeatedly misstated the record. In support of his contention that the contract in question is a conditional sale, defendant cites Snoby v. Gruposynski, 157 Ill. App. 33, wherein the contract provided that if the party of the second part would make payments and perform certain covenants on his part, the party of the first part would sell and transfer certain personal property, and the court held that it was a conditional sale contract and entitled the party of the first part to repossess himself of the property where payments had not been made under its terms. That decision, of course, does not apply to the instant contract, which was an absolute contract of sale.

The defendant failed to sustain his plea of justification that he had taken possession of the premises under the terms of the contract and, therefore, as he made no defense under the plea of not guilty or the special plea of non assaut domage, the sole defense remaining to him related to the question of damages. This fact must be borne in mind in the consideration of certain contentions raised by the defendant.

The defendant complains that the trial court made remarks that prejudiced the jury against the defendant. We have patiently considered the remarks of the court cited by the defendant in support of this complaint and we find that there is absolutely no merit in it. In fact, the record discloses that the defendant did not object to any of the remarks of which he now complains, and it is apparent that the instant complaint is an afterthought. The defendant complains that "throughout the trial the court assumed an unfriendly attitude towards the defendant and his witnesses," but he has failed to call to our attention any conduct of the court that warrants such a contention.

The defendant next contends that the trial court failed to rebuke plaintiffs' counsel for making improper arguments to the jury. In his argument counsel for the plaintiffs stated that the defendant, a lawyer, "deliberately uses strong arm methods, goes into the premises of the plaintiffs and with the aid of a slugger, takes possession by physical force." Counsel for the defendant objected to this statement, and while the trial court does not seem to have passed upon the objection we may say that we think the counsel for the plaintiffs was fully justified, under the proof, in making the statement. Counsel for the plaintiffs further stated that "it is obvious that no living man regardless of whether he was an attorney or not, could get up and tell you all the rot he testified to here." Upon an objection by the defendant the court ruled that the counsel had the right to argue that the defendant was not telling the truth. The court ruled correctly. Counsel for the plaintiffs stated to the jury that the sister of the defendant, a witness for him, knew that she was not telling the truth. Here the counsel for the defendant broke in with the statement, apparently addressed to the counsel for the plaintiffs, that what the latter said was an insult to a woman who was not present. Counsel made no objection to the

The defendant complains that the trial court made remarks that prejudiced the jury against the defendant. We have previously considered the remarks of the court made by the defendant in support of this complaint and we find that there is absolutely no merit in it. In fact, the record discloses that the defendant did not object to any of the remarks of which he now complains, and it is apparent that the instant complaint is an afterthought. The defendant complains that "throughout the trial the court behaved in a prejudicial attitude towards the defendant and his witnesses," but he has failed to call to our attention any conduct of the court that warrants such a contention. The defendant now complains that the trial court failed to require plaintiff's counsel to make proper arguments to the jury. In his argument counsel for the plaintiff stated that the defendant, a lawyer, "deliberately made errors and omissions, gave also the premises of the plaintiff and with the aid of a lawyer, takes possession by physical force." Counsel for the defendant objected to this statement, and while the trial court does not seem to have heeded when the objection was made we think the counsel for the plaintiff was fairly justified under the facts in making the statement. Counsel for the plaintiff further stated that "it is obvious that he [defendant] was regardless of whether he was an attorney or not, could get up and tell you all the rot he testified to here." Upon an objection by the defendant the court ruled that the counsel and the witness might be asked that the defendant was not telling the truth. The court then ruled that the counsel for the plaintiff asked to the jury that the sister of the defendant, a witness for him, knew that she was telling the truth. Here the counsel for the defendant broke in with the statement, apparently addressed to the counsel for the plaintiff, that the latter said was an insult to a woman who was not present. Counsel made no objection to the

remark and did not ask the court to rule upon the same, and there was no ruling.

The defendant contends that the court excluded competent evidence offered by the defendant. It is somewhat difficult for us to follow the disconnected argument made by the defendant in support of this contention. The plaintiff Goebel, on direct, testified to facts and circumstances tending to make out a prima facie case of trespass, and he was not interrogated, upon the direct, about any matter tending to show a breach of the contract. The defendant had no right to cross-examine him upon alleged breaches of the contract. Moreover, alleging breaches would not warrant the acts of the defendant complained of by the plaintiffs. On the cross-examination of Goebel the defendant put the following question: "On May 7th, hadn't there been a bill due the Law Bulletin Publishing Company for some time prior to ten days previous thereto? Mr. McKeon (attorney for plaintiffs): I object; that is immaterial, your Honor, that is not proper cross-examination. The Court: Objection sustained." The court ruled correctly. Defendant's counsel asked Goebel the following question: "Did you have possession of the lease on the premises in question, Mr. Witness? Mr. McKeon: I object to that; the contract shows the lease was assigned. The Court: Objection sustained." It was conceded that the plaintiffs were in possession under the contract from December 5, 1929, until May 12, 1930. It was entirely immaterial whether or not the witness had the lease in his possession. We may add that the defendant did not produce the lease nor ask the plaintiffs to do so.

The defendant complains that the court erred in not permitting him to testify "as to how he came to meet the plaintiffs in the first instance." We see no error in that ruling, as the contract as made determines the rights of the parties. The defendant further

remark and did not ask the court to take upon the case, and there was no ruling.

The defendant contends that the court excluded competent

evidence offered by the defendant. It is somewhat difficult for

us to follow the argument presented by the defendant in

support of this contention. The plaintiff's case, as direct, testi-

fied to facts and circumstances tending to make out a prima facie

case of trespass, and he was not interrogated, upon the direct, about

any matter tending to show a breach of the contract. The defendant

had no right to cross-examine him upon alleged breaches of the con-

tract. Moreover, alleged breaches would not vitiate the acts of

the defendant complained of by the plaintiff. On the cross-examination

of Joseph the defendant put the following question: "On May 1st,

hadn't there been a bill out the New Orleans Publishing Company

for some time prior to the above question answered by Mr. Joseph

(counsel for plaintiff): "Object; that is immaterial, your

Honor, that is not proper cross-examination. The Court: Objection

sustained." The same was asked correctly. Defendant's counsel asked

Joseph the following question: "Did you have possession of the lease

on the premises in question, witness Mr. Joseph: I object to

that; the contract shows the lease was assigned. The Court: Objection

sustained." It was suggested that the plaintiff was in possession

under the contract from December 11, 1922, until May 15, 1923. It was

entirely immaterial whether or not the witness had the lease in his

possession. He may not have the document but he produces the lease

and ask the plaintiff to do so.

The defendant contends that the court erred in not per-

mitting him to testify "as to how he came to meet the plaintiff in

the first instance." He was not asked in that regard, as the contract

was before him at the time of the trial. The defendant further

complains that the court erred in refusing to allow him to testify that the rent for the premises was not paid while the plaintiffs were in possession. We find no error in that ruling. We have considered several other contentions of the defendant in reference to the exclusion of evidence and we find no merit in any of them.

The defendant next contends that the court erred in giving to the jury plaintiffs' third instruction, as follows:

"The court instructs you, as a matter of law, that where two witnesses testify directly opposite to each other on a material point, and are the only ones that testify to the same point, you are not bound to consider the evidence evenly balanced or the point not proved; you may regard all the surrounding facts and circumstances proved on the trial, and give credence to one witness over the other, if you think such facts and circumstances warrant it."

This is a stock instruction frequently given and never, to our knowledge, disapproved. It was approved in Chicago & E. I. R. R. Co. v. Rains, 106 Ill. App. 539, and was also affirmed by the Supreme court in the same case. (See Chicago & E. I. R. R. Co. v. Rains, 203 Ill. 417, 422.) Other cases approving the instruction might be cited if it were necessary.

The defendant next contends that the court erred in giving to the jury plaintiffs' fourth instruction, which reads as follows:

"The jury are instructed that the plaintiffs must establish their case by a preponderance of the evidence. This preponderance, however, is not alone necessarily determined by the number of witnesses testifying to a particular fact or state of facts. In determining upon which side the preponderance of the evidence is, the jury should take into consideration, in addition to the number of witnesses so testifying, the opportunities of the several witnesses for seeing or knowing the things about which they testify; their conduct and demeanor while testifying; their interest or lack of interest, if any, in the result of the case; the relation or connection, if any, between the witness and the parties; the apparent consistency, fairness and congruity of the evidence; the probability or improbability of the truth of their several statements, in view of all the other evidence, facts and circumstances proved on the trial; and from all these facts determine upon which side is the weight or preponderance of the evidence." (Italics ours.)

The defendant contends that the use of the italicized word "should" has been criticised by the Supreme court in the following cases:

Lyons v. Chicago City Ry. Co., 258 Ill. 75; Fitzgerald v. Sampsell,

The defendant next contended that the court erred in giving the exclusion of evidence and we find no merit in any of them.

Also several other contents of the defendant in reference to were in possession. We find no error in that ruling. We have con- sidered the case for the previous was not paid while the plaintiff complains that the court erred in refusing to allow him to testify

The defendant wants to cross-examine the witness in the following manner:

has been established by the following cases:

191 Ill. App. 366; Rudin v. Wheelock, 249 Ill. App. 249. It may be conceded that the use of this word has been criticized at times, but in the first two cases cited it was held that the use of the word did not constitute reversible error. In Rudin v. Wheelock the instruction was materially different from the one now before us and it was held that the instruction in that case was erroneous because it did not take into account the force and effect of the greater number of witnesses. The instruction before us is not subject to that criticism. The contention of the defendant that the court erred in giving the plaintiffs' fifth instruction is without merit.

The defendant next contends that the court erred in refusing to give his instructions "4, 5 and 6." The defendant does not quote the instructions referred to in his brief and under the rules we would be justified in disregarding his contention on that ground alone. Moreover, we do not find that the instructions are numbered either in the abstract or the record. We are assuming, however, that the defendant refers to the fourth, fifth and sixth of his refused instructions. The defendant's fourth refused instruction was properly refused because it called upon the jury to interpret the contract, and the construction of the contract was for the court. The defendant's fifth refused instruction was properly refused for a number of reasons. Whether certain of the personal property in the premises in question belonged to the Apartment House & Hotel Association was immaterial in the instant case for the reason that the defendant did not own the same and the plaintiffs were in possession of the same and had a right to maintain this action against the defendant, even though they may not have owned the property in question. Moreover, in the contract the defendant treats himself as the owner of the property

101 III. App. 300; Wright v. Wright, 200 Ill. App. 242. It may be conceded that the use of this word has been criticized at times, but in the first two cases cited it was held that the use of the word did not constitute reversible error. In Wright v. Wright the instruction was substantially identical with the one now before us and it was held that the instruction in that case was erroneous because it did not take into account the force and effect of the greater number of witnesses. The instruction before us is not subject to the criticism. The contention of the defendant that the court erred in giving the plaintiffs' fifth instruction is without merit.

The defendant next contends that the court erred in refusing to give his instructions "A. 5 and 6." The defendant does not quote the instructions referred to in his brief and under the rules we would be justified in disregarding his contention on that ground alone. Moreover, we do not find that the instructions are numbered either in the abstract or the record. We are assuming, however, that the defendant refers to the fourth, fifth and sixth of his proposed instructions. The defendant's fourth refused instruction was properly refused because it relied upon the jury to interpret the contract, and the construction of the contract was for the court. The defendant's fifth refused instruction was properly refused for a number of reasons. Whether certain of the personal property in the premises in question belonged to the defendant, House & Abel, association was immaterial in the instant case for the reason that the defendant did not own the same and the plaintiffs were in possession of the same and had a right to maintain this action against the defendant, even though they may not have owned the property in question. Moreover, in the contract the defendant grants himself as the owner of the property

in question and also makes the plaintiffs owners of the same by virtue of the conveyance. The court properly refused the defendant's sixth refused instruction, which authorized a finding for the defendant if the jury found that the lease of the premises in question had not been assigned to the plaintiffs. It is sufficient to say that the mere nonassignment of the lease would not entitle the defendant to a verdict in his favor, because the plaintiffs were admittedly in the actual physical possession of the premises. Moreover, the contract expressly gave them the possession of the premises, and it did not require a formal execution of the assignment of the lease to give complete possession to the plaintiffs.

The defendant next contends that the damages are grossly excessive. In his argument in support of this contention the defendant has not hesitated to call to our attention damages he claims to have sustained by reason of alleged breaches of the contract by the plaintiffs, nor has he hesitated to state alleged matters not appearing in the record. If the plaintiffs have breached the contract and the defendant has suffered damages thereby, he knows, as a lawyer, that the law, in an apt proceeding, would afford him ample redress. We are satisfied that the jury were fully warranted in finding that the defendant intentionally and deliberately took the law into his own hands and committed the trespass charged in the declaration. It was an outrageous act and the jury were fully warranted in assessing punitive damages against the defendant. However, we have very carefully considered the amount of the damages assessed and we have reached the conclusion that they are excessive. We think that \$3,000 would be a proper amount to allow the plaintiffs for damages. Accordingly, if within ten days plaintiffs file in this court a remittitur of \$3,000, the judgment against

in question and also among the plaintiffs owners of the same by virtue of the conveyance. The court properly refused the defendant's claim for interest, which amounted to a finding for the defendant. It was found that the issue of the premises in question had not been assigned to the plaintiffs. It is sufficient to say that the mere nonassignment of the lease would not entitle the defendant to a verdict in his favor, because the plaintiffs were admitted in the actual physical possession of the premises. Moreover, the contract expressly gave them the possession of the premises, and it did not require a formal execution of the assignment of the lease to give complete possession to the plaintiffs. The defendant went on to show that the damage was greatly excessive. In his argument in support of this contention the defendant has not hesitated to call to our attention damage he claims to have sustained by reason of alleged presence of the contract by the plaintiffs, nor has he hesitated to state alleged matters not appearing in the record. If the plaintiffs have breached the contract and the defendant has suffered damage therefrom, he knows, as a lawyer, that the law, in an appropriate case, would afford him relief. He has admitted that the jury were fully warranted in finding that the defendant intentionally and deliberately took the law into his own hands and committed the trespass charged in the declaration. It was an outrageous act and the jury were fully warranted in assessing punitive damages against the defendant. However, we have very carefully considered the amount of the damages assessed and we have reached the conclusion that they are excessive. We think that \$10,000 would be a proper amount to allow the plaintiff for damages. Accordingly, it will be so ordered. The judgment was reversed in this case a majority of 5, 0, 0, the judgment was

the defendant will be affirmed for \$3,000, otherwise it will be reversed and the cause remanded to the Superior court of Cook county for another trial.

AFFIRMED FOR \$3,000 UPON REMITTITUR;
OTHERWISE REVERSED AND CAUSE REMANDED
FOR ANOTHER TRIAL.

Gridley, P. J., and Kerner, J., concur.

THE DEPT. OF THE ARMY, WASHINGTON, D. C. 20315

reverts and is owned to the United States of America

[illegible]

ANTI-COMMUNISM THAT COULD BE A MAJOR
MOVEMENT FOR THE UNITED STATES AND
THE WORLD.

1940-1941

35462

TILLIE FELGENHAUER,
Appellant,

v.

CARL O. HELMER,
Appellee.

427
APPEAL FROM SUPERIOR
COURT, COOK COUNTY.

265 I.A. 602

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Tillie Felgenhauer, plaintiff, sued Carl O. Helmer, defendant, in case. A trial before a jury resulted in a verdict of not guilty. Judgment was entered on the verdict and the plaintiff has appealed.

The declaration originally consisted of six counts, but at the end of all ^{the} testimony the plaintiff withdrew all but the first and third. The first charges that on September 15, 1929, while the plaintiff was a passenger in a certain automobile belonging to and being driven by John Foley in an easterly direction on Fullerton avenue, in the city of Chicago, and while at or near the intersection of Fullerton avenue with Laramie avenue, the defendant was driving his car in a southerly direction on Laramie avenue and so carelessly, negligently and improperly drove his car that he collided with the car in which the plaintiff was riding, thereby causing her to sustain a fractured pelvis, fractures of two vertebrae, a permanent injury to her left leg and foot, and many internal injuries. The count also alleges that the plaintiff, at the time of the accident and immediately prior thereto, was in the exercise of due care and caution for her own personal safety. The third count charges, inter alia, that the defendant violated a certain statute of the State of Illinois in that within said city

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25262

ILLINOIS COURT OF APPEALS

v.

JOHN O. NELSON, Appellee.

COUNTY OF COOK, ILLINOIS

252 I.A. 602

THE JUDICIAL COUNCIL OF THE STATE OF ILLINOIS

Illinois Appellate Court, Plaintiff, and John O. Nelson,

Defendant, in case. A trial before a jury resulted in a verdict of not guilty. Judgment was entered on the verdict and the plaintiff has appealed.

The decision originally rendered at its session, but at the end of which the plaintiff withdrew all but the first and third. The first charges that on September 13,

1937, while the plaintiff was a passenger in a certain automobile belonging to and being driven by John Foley in an easterly direction on Madison Avenue, in the city of Chicago, and while at or near the intersection of Madison Avenue with Laramie Avenue, the defendant was driving his car in a southerly direction on Laramie Avenue and as a result, negligently and intentionally drove his car into the plaintiff's car in which the plaintiff was riding, thereby causing her to sustain a fractured pelvis, fractures of two vertebrae, a permanent injury to her left leg and foot, and many internal injuries. The court also alleges that the plaintiff, at the time of the accident and immediately prior thereto, was in the exercise of due care and caution for her own personal safety. The third count charges, inter alia, that the defendant violated a certain statute of the State of Illinois in that within said city

he operated, managed and drove his automobile, without regard to the traffic and the use of the way, so as to endanger the life and limb of plaintiff and others, and that he drove said automobile at an excessive rate of speed, to-wit, thirty-five miles per hour, in consequence of which negligence the automobile of defendant ran into, upon and against the automobile in which plaintiff was riding as a passenger, and as a result plaintiff sustained the said injuries (alleging them). The defendant pleaded the general issue, and also a plea of non-ownership, non-operation and non-control of the automobile in question, which last plea was withdrawn at the trial.

The plaintiff contends and strenuously argues that the verdict and judgment are against the manifest weight of the evidence. After a very careful reading of the entire evidence we have reached the conclusion that this contention is clearly a meritorious one. The overwhelming weight of the evidence supports the theory of fact of the plaintiff, and we are unable to understand upon what grounds the jury made their finding for the defendant. It would be a clear miscarriage of justice to permit the present judgment to stand. As the case may be tried again we refrain from analyzing and commenting upon the testimony.

The judgment of the Superior court of Cook county is reversed and the cause is remanded.

REVERSED AND REMANDED.

Gridley, P. J., and Kerner, J., concur.

no operator, damaged and drove his automobile, without regard to the traffic and the use of the way, so as to endanger the life and limb of plaintiff and others, and that he drove said automobile at an excessive rate of speed, to-wit, thirty-five miles per hour, in consequence of which negligence the automobile of defendant ran into, upon and against the automobile in which plaintiff was riding as a passenger, and as a result plaintiff sustained the said injuries (affecting them). The defendant placed the General Land, and also a piece of non-sufficient, non-operation and non-control of the automobile in question, which fact was withdrawn at the trial.

The plaintiff contends that defendant's evidence that the verdict and judgment are against the plaintiff as to the evidence after a very careful reading of the entire evidence we have reached the conclusion that this contention is clearly a mistaken one. The overwhelming weight of the evidence supports the theory of fact of the plaintiff, and we are unable to understand upon what grounds the jury made their finding for the defendant. It would be a clear mis- carriage of justice to permit the present judgment to stand. As the case may be tried again we retain from analyzing and commenting upon the testimony.

The judgment of the superior court of Cook County is

reversed and the case is remanded.

WILLIAM H. HARRIS.

GRADY, J. J. and HARRIS, J. J. CONCUR.

SIGMUND LOEFFLER,
(Complainant) Defendant in Error.

vs.

FRED DAVIS, GEORGE SWARZ,
AUGUST SWARZ et al.,
(Defendants) Plaintiffs in Error.

AUGUST SWARZ,
(Defendant) Plaintiff in Error.

WRIT OF ERROR TO CIRCUIT
COURT OF COOK COUNTY,
FROM A DECREE OF SALE,
DEFICIENCY DECREE and
THE APPOINTMENT OF A
RECEIVER.

265 I.A. 602²

MR. PRESIDING JUSTICE O'CONNOR
DELIVERED THE OPINION OF THE COURT.

June 28, 1928, Sigmund Loeffler filed his bill to foreclose a third mortgage on certain real estate in Chicago. On the next day a receiver was appointed with the usual powers. A number of parties were made defendants, including August Swarz. The proofs were taken by a master in chancery who made up his report recommending a decree as prayed for in the bill. A decree was entered, sale of the property had, and later there was a deficiency decree and the receiver continued by order of court to collect rents, during the period allowed by law within which the property might be redeemed, to apply on the deficiency. The master has executed a deed to the property, the receiver has made his final report, which has been approved, and the defendant Swarz prosecutes this writ of error, contending, as near as we are able to make out, that the receiver was erroneously appointed; that he, Swarz, was wrongfully defaulted for want of an answer to the bill; that the disbursements made by the receiver in the repair of the property and in the collection of rents were unwarranted and that the court erred in refusing to permit him to intervene long after the property was sold under the decree.

As stated, the bill was filed June 28, 1928, and Swarz was made a party defendant, it being alleged that he had, or

INVESTIGATION OF THE
(Continued)

vs.

JOHN DAVIS, JAMES HARRIS,
ARREST WARRANT of 1...
(Defendants) Plaintiff in Error.

ARREST WARRANT,
(Defendant) Plaintiff in Error.

265 I.A. 602

THIS IS A WRIT OF HABEAS CORPUS
FOR THE COURT OF COOK COUNTY,
STATE OF ILLINOIS, and
RETURNED BY THE CLERK OF A
THE COURT OF COOK COUNTY,
JANUARY 28, 1935.

ALL EXHIBITS TO THIS ORDER
DELIVERED TO THE CLERK OF THE COURT.

June 28, 1935, Plaintiff filed his bill to

revoke a writ of habeas corpus in Chicago. On
the next day a receiver was appointed with the usual powers. A
number of parties were made defendants, including August Swartz.
The writs were taken by a master in equity who made up his re-
port recommending a decree as prayed for in the bill. A decree
was entered, and the property had, and later there was a half-
decree entered and the receiver continued by order of court to col-
lect rents, during the period allowed by law within which the
property might be redeemed, to apply on the half-decree. The mas-
ter has executed a deed to the property, the receiver has made his
final report, which has been approved, and the defendant Swartz
prosecutes this writ of error, contending, as best as we are able
to make out, that the receiver was erroneously appointed; that he,
Swartz, was rightfully entitled for want of an answer to the bill;
that the appointments made by the receiver in the repair of the
property and to the collection of rents were unwarranted and that
the court erred in refusing to permit him to intervene later after
the property was sold under the decree.

As stated, the bill was filed June 28, 1935, and Swartz

was made a party defendant, it being alleged that he had, ex

claimed to have, some interest in the premises but which interest, if any, was inferior or subordinate to the mortgage sought to be foreclosed. The summons was returnable to the August term and was served personally on Swarz August 2, 1928. On August 20, 1928, Swarz filed his written appearance, representing himself. He states that he is not a lawyer. September 12th a notice and petition were served by the receiver on Swarz and others, that he would on September 14th ask that an order be entered by the court authorizing him to make certain repairs on the property, and on that date an order was entered authorizing the receiver to do so, which order bears the "O. K." of Swarz. Afterwards Swarz was defaulted for failure to file an answer, the cause was referred to a master in chancery, who took the proofs. None of the defendants appeared and no proof was offered except that by the complainant. Swarz did not appear. Throughout the record there appear a number of notices mailed to Swarz of various orders that were to be asked by the receiver and the complainant. These notices were mailed to Swarz at different times to four different addresses in Chicago. The master's report was dated July 12, 1929; no objection was made by anyone and it was stated that no one appeared for defendants before the master to offer any proof, and no defendant appears in this court except Swarz. The decree of sale was entered July 18, 1929, and the property sold subject to the lien of the first and second mortgages, the first for \$21,000 and the second for \$48,000. The master's report of sale and distribution was filed August 15, 1929, and shows a deficiency of over \$5,000, and there was a decree confirming the report of sale and distribution on the same date, and a deficiency decree entered that the complainant had a lien on the rents, issues and profits during the period of redemption. The deficiency was not against anyone personally.

Illinois to the same interest in the premises out of which interest,
 if any, was inferior or subordinate to the mortgage sought to be
 foreclosed. The mortgage was recordable in the public land and was
 served personally on Swann August 1, 1928. On August 15, 1928,
 Swann filed his written answer, representing himself. He stated
 that he is not a lawyer. Subsequently a notice and petition were
 served by the receiver on Swann and others, that he would on Sep-
 tember 15th ask that an order be entered by the court authorizing
 him to make certain repairs on the property, and on that date an
 order was entered authorizing the receiver to do so, which order
 bears the "L. I." of Swann. Afterward Swann was deputed for
 failure to file an answer, the same was returned to a master in
 chancery, who took the proceeds. None of the testimony appeared and
 no proof was offered except that by the complaint. Swann did not
 appear. Thereafter the record there shows a number of notices
 mailed to Swann at various places that were to be made by the re-
 ceiver and the complaint. These notices were mailed to Swann at
 different times to four different addresses in Chicago. The mas-
 ter's report was dated July 15, 1928; no objection was made by any
 one and it was stated that no one appeared for defendant before the
 master to offer any proof, and no defendant appeared in this court
 except Swann. The decree of sale was entered July 15, 1928, and
 the property sold subject to the lien of the first and second
 mortgages, the first for \$10,000 and the second for \$4,000. The
 master's report of sale and distribution was filed August 15, 1928,
 and shows a deficiency of over \$5,000, and there was a decree con-
 firming the report of sale and distribution on the same date, and
 a deficiency decree entered that the complainant had a lien on the
 rents, issues and profits during the period of redemption. The
 deficiency was not paid and was not paid personally.

The first Swarz appears in the case, after filing his appearance and "O. K'ing" the order authorizing the receiver to make repairs as above stated, is on October 31, 1930, when he caused notice to be served that he would ask leave to file a petition requesting that the receiver deposit all rents collected by him with the clerk of the court and that they be turned over to the owner of the equity of redemption. The court denied Swarz's motion and refused to permit him to file the petition.

By the terms of the trust deed the grantor waived all rights to the income from the premises pending foreclosure, and agreed that upon the filing of the bill to foreclose a receiver might be appointed to take possession of the property and collect the rents.

On the hearing of Swarz's petition, filed as above stated, by which he sought to intervene and to overturn practically everything that had been done in the case, it appeared that Swarz's interest in the premises, as claimed by him, was that he was the owner of an undivided one-half interest in the property as evidenced by a quit-claim deed dated May 15, 1928, but which was not acknowledged until January 10, 1931, and which the court found had not been recorded.

It therefore appears from Swarz himself that at the time the foreclosure suit was filed, and continuously thereafter, he had no interest of record in the property. Nor is there any contention that the complainant had any notice or knowledge of the unrecorded deed. In this view of the case, it is obvious that Swarz was not a necessary party to the foreclosure suit. Assuming that Swarz's interest is as contended for by himself, then the fact, if it be a fact, that the receiver was wrongfully appointed, that Swarz was defaulted without notice, contrary to the rule of

The first party appears in the case, after filing his answer and "U. S. A. No. 1" the order requiring the receiver to make reports as above stated, is on October 21, 1920, when he caused notice to be served on the receiver and leave to file a petition requesting that the receiver should all taxes collected by him with the clerk of the court and that they be turned over to the owner of the right of redemption. The court denied Warr's motion and refused to permit him to file the petition.

By the terms of the deed the grantor waived all rights to the income from the premises pending foreclosure, and agreed that upon the filing of the bill to foreclose a receiver might be appointed to take possession of the property and collect the rents.

On the morning of Warr's petition, filed as above stated, by which he sought to intervene and to overturn practically everything that had been done in the case, it appeared that Warr's interest in the premises, as claimed by him, was that he was the owner of an undivided one-half interest in the property as evidenced by a quit-deed dated July 12, 1920, but which was not acknowledged until January 10, 1921, and which the court found had not been recorded.

It is to be noted from Warr's pleadings that at the time the foreclosure suit was filed, and was lawfully instituted, he had no interest at all in the property. Nor is there any contention that the defendant had any notice or knowledge of the undivided deed. In this view of the case, it is obvious that Warr was not a necessary party to the foreclosure suit. Assuming that Warr's interest is as contended for by himself, then the fact, if it be a fact, that the receiver was wrongfully appointed, that Warr was defrauded without notice, contrary to the rule of

the Circuit court, and all other matters of which he complained, are purely academic because Swarz had no interest in the property and he cannot be heard to complain.

The decree and orders of the Circuit court of Cook County are affirmed.

AFFIRMED.

McSurely and Katchett, JJ., concur.

the circuit court, and all other matters of which he complained,
are purely academic because there had no interest in the property
and he cannot be heard to complain.

The decree and order of the circuit court of Cook

County are affirmed.

AFFIRMED.

McGowan and McArthur, JJ., concur.

35390

TOPLIS and HARDING, INC.,
a Corporation,

Plaintiff in Error,

vs.

K. W. KEMPF,

Defendant in Error.

497
ERROR TO MUNICIPAL COURT
OF CHICAGO.

265 I.A. 602³

MR. PRESIDING JUSTICE O'CONNOR
DELIVERED THE OPINION OF THE COURT.

Plaintiff, the payee of a promissory note made by the defendant, dated January 4, 1929, for \$3125, due 90 days after date, caused judgment by confession to be entered in its favor against the defendant maker. Afterwards, on motion of the defendant, the judgment was opened up and he was given leave to defend. The defense interposed was that there was no consideration for the note. A trial before the court without a jury resulted in a finding and judgment in defendant's favor, and plaintiff prosecutes this writ of error.

The record discloses that defendant's nephew, William H. Kempf, was employed as manager of the foreign steamship department of the National Bank of the Republic of Chicago, and during July, 1928, he was found to be short in his accounts with the bank. The shortage was thought to be about \$17,000, but later on turned out to be more than \$34,000. It appears that under a policy of insurance plaintiff was liable to the bank for the shortage. Apparently plaintiff settled this matter with the bank and was subrogated to all of the rights of the bank.

Plaintiff, through its representative, Mr. Colford, was endeavoring to adjust the matter and took the nephew, or went with him, to defendant's office with a view of seeing what could be done. The defendant was apprised of the nephew's predicament and after three or four meetings covering a period of a few days,

TOPICS AND ANSWERS, INC.,

a Corporation, Plaintiff in Error,

vs.

K. W. KEMP, Defendant in Error.

Defendant in Error.

ORDER TO MUNICIPAL COURT
OF CHICAGO.

325 I.A. 602

MR. THOMAS J. JONES, CLERK FOR
DELIVERED THE ORDER OF THE COURT.

Plaintiff, the payee of a promissory note made by the defendant, dated January 4, 1928, for \$1000, has 90 days after date, caused judgment by confession to be entered in its favor against the defendant maker. Afterwards, on motion of the defendant, the judgment was opened up and he was given leave to defend. The referee interpreted the fact there was no consideration for the note. A trial before the court without a jury resulted in a finding and judgment in defendant's favor, and plaintiff prosecuted this writ of error.

The record discloses that defendant's nephew, William E. Kemp, was employed as manager of the local steamship department of the National Bank of the Republic of Chicago, and during July, 1928, he was found to be short in his accounts with the bank. The shortage was thought to be about \$17,000, but later on turned out to be more than \$25,000. It appears that under a policy of insurance plaintiff was liable to the bank for the shortage. Apparently plaintiff settled this matter with the bank and was obligated to all of the assets of the bank.

Plaintiff, through its representative, Mr. Gifford, was endeavoring to adjust the matter and took the nephew, or went with him, to defendant's office with a view of seeing what could be done. The defendant was notified of the nephew's predicament and after three or four meetings covering a period of a few days,

the uncle, defendant, agreed to settle the matter with plaintiff by paying \$10,000. Apparently \$5,000 was paid in cash and the note in suit was given by defendant to take up a prior note which defendant had given plaintiff for \$5,000 and on which he had paid \$2,000.

Plaintiff's version of the matter is that the note was given to settle the nephew's civil liability and that nothing was said about any settlement of the nephew's criminal liability. On the other hand, defendant's contention was that the note was given in settlement of the criminal liability and was therefore without consideration and void. Evidence was offered by each side tending to support their respective contentions. There is little or no dispute between counsel as to the law governing the case, but the chief divergence of opinion arises when it is sought to apply the law to the facts in the case.

A preliminary question is raised by plaintiff, in which it contends that the court erred in opening up the judgment and permitting the defendant to interpose his defense, and that later the court erred in overruling the plaintiff's motion to expunge the order allowing the defendant to appear and defend. There is no merit in this contention; and it is not saved for review because, after the judgment was opened, the plaintiff went to trial on the merits and thereby waived the question. Zandstra v. Zandstra, 226 Ill. App. 293; Central Bond Co. v. Roeser, 323 Ill. 90; Re Estate of Peter Voislowsky, No. 35540, Appellate Court, First District, opinion filed January 25, 1932, and cases there cited.

It is the law, all the authorities agree, that where one embezzles the money of another, an agreement to compound the felony will not be enforced, and that any security or note based upon such consideration is void. Tramblay v. Hyde Park State Bank,

the whole, defendant, agreed to settle the matter with plaintiff by paying \$25,000. Accordingly \$25,000 was paid in cash and the note in suit was given by defendant to take up a prior note which defendant had given plaintiff for \$2,000 and on which he had paid \$2,000.

Plaintiff's version of the matter is that the note was given to settle the nephew's civil liability and that nothing was said about any settlement of the nephew's criminal liability. On the other hand, defendant's version was that the note was given in settlement of the criminal liability and was therefore without consideration and void. Evidence was offered by each side tending to support their respective contentions. There is little or no dispute between counsel as to the law governing the case, but the chief difference of opinion arises when it is sought to apply the law to the facts in the case.

A preliminary question is raised by plaintiff, in which it contends that the court erred in opening up the judgment and permitting the defendant to introduce his defense, and that later the court erred in reversing the plaintiff's motion to set aside the verdict allowing the defendant to appear and defend. There is no error in this connection; and it is not saved for review because, after the judgment was entered, the plaintiff went to trial on the merits and thereby waived the question. Landgraf v. Landgraf, 230 Ill. App. 403; Smith v. Smith, 232 Ill. App. 40; He Estate of John W. W. W., 232 Ill. App. 40; and cases there cited.

It is the law, and the authorities agree, that where one contracts the duty of another, an agreement to compound the felony will not be enforceable, and will not be binding or have effect upon such consideration as is paid. People v. Smith, 232 Ill. App. 40.

336 Ill. 80; Ford v. Cratty, 52 Ill. 313; Osento National Bank v. Weber, 240 Ill. App. 222. Such agreement need not necessarily be expressly made, but it is sufficient if it is impliedly understood by the parties. Tramblay v. Hyde Park State Bank, supra.

In the Tramblay case the wife filed a bill to set aside a deed made by her and her husband on the ground that it was executed by her to prevent the prosecution of her husband for a crime, and to prevent him from being sent to the penitentiary. It was there held that where a wife knowingly and voluntarily executes a deed to a bank as partial restitution of her husband's embezzlement as cashier, and the evidence shows no promises were made of immunity to the husband, the deed will not be set aside as having been made to avoid criminal prosecution, notwithstanding the fact that the wife may have thought that if partial restitution were made there would be no prosecution. The court said (p. 84): "Appellant relies upon cases *** where the parties losing the money by the criminal act of the person accused agreed that if it was restored there would be no prosecution for the crime." The court then referred to the case of Williams v. Bayley, 1 L. R. (Eng. & Ir. App.) 200, decided by the House of Lords, and in discussing that case said (p. 85): "The case appears to have been treated by the Lords as one where it was expressly or impliedly understood that there would be no prosecution of the son if the father gave the security. The decision was in favor of the father." And continuing, our Supreme court referred to Restad v. Thorsen, (Ore.), L. R. A. 1917-D, p. 1170, where a cashier had by forgeries embezzled the bank's money. He admitted his shortage and expressed willingness to make restitution, saying that his wife owned the home and would soon inherit a considerable amount of property. The president of the bank called on the wife and caused her to execute a deed and some notes. Afterwards the wife brought suit to cancel the deed

by the Bureau.

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executed by her so prevent the possibility of her husband for a

SA* : (A) .n) bta ttooz #47

by the original set of the same material. It is not

There is no other person named in the case of *William A. Smith*, J. C. Smith.

...of the ... to ... of ... (...)

by the words "and that it is entirely of public interest"

that there would be no opposition at the latter date

the security. The decision was in favor of the "yes" side.

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U. S. A. 1-17-52, 2. 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931,

the bank's money.

[illegible]

20 million or more. The number of people who are

The first bill in the bill and passed but to receive a final vote.

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and notes, and the decision in the trial court was in her favor and on appeal was affirmed. Our Supreme court there quoted with approval from that case the following: (p. 85) "We think it is established by the preponderance of the evidence that the defendants at least impliedly gave Rostad to understand that if he made restitution he would not be prosecuted, and that there was an implied threat that unless he did make restitution the law would be permitted to take its course. The matter was in such a position that it was evident his only chance of escaping the penitentiary was to make restitution for the amount of his theft." And further, that the defendant's representative "informed her of the circumstances and gave her to understand that unless she assisted him he would be sent to the penitentiary;" that she signed the papers to prevent her husband being prosecuted, and that the defendants understood this fact. And continuing, our Supreme court, referring to that case, said (pp. 86-87): "In that case the court found that the evidence showed the president of the bank gave the wife of Rostad to understand that unless she did what she was requested to do, her husband would be sent to the penitentiary."

In the instant case the learned trial Judge, in deciding the case, said: "If there was no express agreement not to prosecute, there surely is an implied agreement arising from all the circumstances in the case. I think he (the defendant) signed it to save his nephew from being prosecuted. I think the evidence substantiates that." And upon a careful consideration of all the evidence in the record, we are unable to say that the finding of the trial court was not warranted by the evidence.

The evidence is to the effect that plaintiff's representative, at the nephew's suggestion, went to the defendant's office and defendant there learned for the first time that the nephew was in trouble on account of his embezzlement of the bank's

and notes, and the decision in the trial court was in her favor
and an appeal was allowed. Now, because of the facts stated with
approval from that case (p. 107) "We think it is
established by the evidence of the witness that the defend-
ant at least legally have been to understand that if he made
testimony as would not be presented, and that there was an im-
plied threat that unless he did make testimony the law would be
permitted to take its course. The matter was in such a position
that it was evident his only chance of escaping the penalty
was to make testimony for the record of his threat." and further,
that the defendant's representative "intended her of the circum-
stances and gave her to understand that unless she assisted him
he would be sent to the penitentiary;" that she signed the paper
to prevent her husband being prosecuted, and that the defendant
understood this fact. And concluding, the supreme court, referring
to that case, said (p. 107): "In that case the court found that
the evidence showed the position of the bank gave the wife of
husband to understand that unless she did what she was requested to
do, her husband would be sent to the penitentiary."
In the instant case the learned trial judge, in de-
ciding the case, said: "It seems to me no express agreement not to
prosecute, there surely is an implied agreement arising from all
the circumstances in the case. I think he (the defendant) signed
it to save his nephew from being prosecuted. I think the witness
substantiated that." and also a certain consideration of all the
evidence in the record, we are unable to say that the finding of
the trial court was not supported by the evidence.
The evidence is to the effect that plaintiff's repre-
sentative, at the proper suggestion, went to the defendant's
office and telephoned him for the first time that the

funds. The amount then was stated to be about \$17,000; that after the matter was discussed for a few minutes the representative and the nephew went to a nearby hotel, where they could discuss the matter without being overheard and where they were soon joined by defendant. Defendant testified: "When I got there (at the hotel) I asked Mr. Colford again in what way we could settle this matter, that no criminal proceedings will follow, none whatsoever. He said, 'If we come to a settlement, it will involve an agreement to end the proceeding whatsoever.' *** Then we came to the agreement that Mr. Colford would not prosecute him;" that later Colford and the defendant went to defendant's counsel's office, and the matter was discussed, and defendant asked Colford if there was some way of settling the case so that no criminal proceedings would be had, and Colford replied in the affirmative; that defendant then offered \$5,000 in full settlement, "that no criminal proceedings should take place." Colford refused, saying the amount was too small; that Colford said the matter could be settled without criminal proceedings because there were only three people at the bank who knew about the matter and they would be bound in honor not to speak of it; that there was talk of Colford taking the nephew to the police station or to the State's Attorney's office; that finally defendant offered \$10,000 in settlement, which was accepted; that part payment was made and a note given; that Colford stated that if the settlement were made, there would be no criminal prosecution. The nephew and counsel for defendant also testified on this matter. Colford testified and denied there was anything said about settling the criminal liability of the nephew, but the agreement was to settle the civil liability.

The trial court saw and heard the witnesses and found in favor of defendant, and we are unable to say that his finding was not warranted by the evidence. The judgment of the Municipal court of Chicago is affirmed.

AFFIRMED.

McSurely and Matchett, JJ., concur.

London. The amount then was stated to be about \$17,000; that after the matter was discussed for a few minutes the representative and the woman went to a nearby hotel, where they could discuss the matter without being overheard and where they were soon joined by defendant. Defendant testified: "From 1 to 2 o'clock (at the hotel) I asked Mr. Colford again in that way as to what he would do in this matter. That no criminal proceedings will follow, none whatsoever. He said: 'If we were to a settlement, it will involve an agreement to end the proceeding whatsoever.' And we came to the agreement that Mr. Colford would not prosecute him." Later, after Colford and the defendant went to defendant's counsel's office, and the matter was discussed, and defendant asked Colford if there was some way of settling the case so that no criminal proceedings would be had, and Colford replied in the affirmative; that defendant then offered \$2,000 in full settlement, "that no criminal proceedings should take place." Colford replied, saying the amount was too small; that Colford said the matter could be settled without criminal proceedings because there were only three people at the bank who knew about the matter and they could be asked in person not to speak of it; that there was talk at Colford's office the afternoon to the police station or to the State's Attorney's office; that finally defendant offered \$10,000 in settlement, which was accepted; that part payment was made and a note given; that Colford stated that if the settlement were made, there would be no criminal prosecution. The answer and complaint for defendant also cancelled on this matter. Colford testified that he was not talking about settling the criminal liability of the answer, but the agreement was to settle the civil liability.

The trial court has heard the witness and found in favor of defendant, and we are unable to say that this finding was not sustained by the evidence. The judgment of the Municipal Court is affirmed.

ALFRED D.

Respectfully and Sincerely, J. J. Connelley.

JOSEPH D. CAVANAUGH,
Appellee,

vs.

LIGHTHOUSE BARBECUE & OIL
STATIONS, INC., a Corporation,
WILLIAM PROEHL and HARRY P. E. HAFFER,
(Defendants)

On Appeal of HARRY P. E. HAFFER,
Appellant.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

265 I.A. 602⁴

MR. PRESIDING JUSTICE O'CONNOR
DELIVERED THE OPINION OF THE COURT.

Plaintiff, the payee of a promissory note, brought suit against the three defendants, one the maker of the note and the other two defendants whose names appear on the back of the note, claiming there was a balance due and unpaid on the principal of \$1725, together with \$220 interest. There was a trial before a Judge and a jury and a directed verdict in favor of plaintiff for the amount of his claim, and the defendant Hafer appeals.

The record discloses that on May 21, 1929, the defendant Lighthouse Barbecue & Oil Stations, Inc., made its note for \$3135 due six months after date to the order of plaintiff, and on the back of the note appear the names of the two defendants William Proehl and Hafer. Plaintiff in his statement of claim alleged that Proehl and Hafer had guaranteed the payment of the note.

Plaintiff testified that at the time the note was executed Hafer signed his name on the back of it and delivered it to plaintiff. He further testified that when the note was due he made demand for payment on Hafer. On cross-examination he testified that he made demand on Hafer for payment about November 15, 1929, a few days before the note was due. There were objections made by counsel for plaintiff when defendants' counsel sought to show what,

if anything, plaintiff did towards obtaining payment of the note from the maker of the note and Hafer at the time it became due. Some of these objections were sustained, plaintiff's theory of the case being that some of these questions were improper because Hafer was a guarantor of the note and not an endorser. We think this was error. Hafer's name was placed on the back of the note before delivery and he was therefore an endorser. Secs. 63 and 64, chap. 98, p. 1955, Cahill's 1931 Statutes. The law was otherwise before the enactment of the Negotiable Instruments act in 1907. Prior to that time plaintiff would have been held as a guarantor. Sec. 63 provides that, "A person placing his signature upon an instrument otherwise than as maker, drawer or acceptor is deemed to be an endorser, unless he clearly indicated by appropriate words his intention to be bound in some other capacity." Sec. 64 provides, "Where a person, not otherwise a party to an instrument, places thereon his signature in blank before delivery, he is liable as indorser in accordance with the following rules:

"1. If the instrument is a note or bill, payable to the order of a third person or an accepted bill, payable to the order of the drawer, he is liable to the payee and to all subsequent parties. ***

"3. If he signs for the accommodation of the payee, he is liable to all parties subsequent to the payee."

Since we hold that Hafer was an endorser and liable as such, to hold him liable the note would have to be presented to the maker for payment and a notice of dishonor given to Hafer unless the note was presented to Hafer for payment. Secs. 88 and 114, Negotiable Instruments Law, chap. 98, pp. 1957 and 1958, Cahill's 1931 Statutes.

In view of the theory on which the case was tried, we think there should be a retrial where all the facts can be adduced as to what was said and done with reference to securing the payment of the note from each or all of the defendants. None of these questions are argued by counsel for plaintiff, who urges technical reasons why the judgment should be affirmed, one of which is that since the bill of exceptions fails to show a motion for a new trial, defendant Hafer is not in a position to raise most of the points he urges here for a reversal. There being a directed verdict, we think no motion for a new trial was necessary, because the question decided by the court was a question of law. It is analogous to a case that is tried by the court without a jury where a motion for a new trial is neither required nor authorized by law or the rules of practice. Climax Tag Co. v. American Tag Co., 234 Ill. 179; Trout v. City of Herrin, 245 Ill. App. 346. In any event, defendant has saved the legal question for review without a motion for a new trial. Yarber v. Chicago & Alton R.R. Co., 235 Ill. 589. We think there was no error in the court refusing the defendant a continuance, nor in the trial Judge examining the prospective jurors, for the reason that it appears that counsel for the defendant knew the case was to be called for trial on the day it was called because he was in court a day or so before, when the case was specifically set and he could not rely on a notice published in the Law Bulletin by the Chief Justice of the court to the effect that no cases would be heard on the day the case was set for trial. The court was entirely warranted in examining the prospective jurors when it was obvious that counsel for the defendant was consuming unnecessary time for no good reason.

The judgment of the Municipal court of Chicago is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

McSurely and Matchett, JJ., concur.

In this case, the Government has failed to establish that the defendant was a member of the Communist Party at the time of the conspiracy. The Government has failed to establish that the defendant was a member of the Communist Party at the time of the conspiracy. The Government has failed to establish that the defendant was a member of the Communist Party at the time of the conspiracy.

... 1970 ...

35530

HELGE ERICKSON,
(Complainant) Appellee,

vs.

DELBERT D. EHRESMAN, ADELAIDE
F. EHRESMAN, ARTHUR F. JOHNSON
and LAURA A. JOHNSON,
(Defendants) Appellees.

RUSSELL FIREBAUGH, Trustee,
Appellant,

vs.

ARTHUR F. JOHNSON et al.,
(Defendants) Appellees.

APPEAL FROM SUPERIOR
COURT OF COOK COUNTY.

265 I.A. 602⁵

MR. PRESIDING JUSTICE O'CONNOR
DELIVERED THE OPINION OF THE COURT.

By this appeal Russell Firebaugh, as trustee, seeks to reverse an order and decree entered by the Superior court of Cook county on July 29, 1931, by which it was ordered and decreed that the receiver pay to the complainant, Helge Erickson, \$1820.01.

The record discloses that on June 20, 1929, the complainant, Erickson, filed a creditor's bill against four defendants wherein he alleged that he had obtained a judgment against them in the sum of \$7100.21; that an execution had been returned no part satisfied and that the defendants had an interest in certain real estate which he sought to reach. July 13, 1929, a receiver was appointed to take charge of the real estate, collect the rents, etc. The receiver qualified and entered upon his duties, and was later succeeded by another receiver. Prior to and at the time complainant obtained his judgment there was a mortgage on the property, given to secure an indebtedness of \$98,500, and on January 15, 1930, Firebaugh, as trustee, under the trust deed, filed his bill to foreclose the mortgage, making the complainant and the defendants in the instant case parties defendant. On March 10, 1930, he filed an intervening petition in

25250

WILLIAM WILSON

(Defendant) Appellee

vs.

WILLIAM WILSON, Plaintiff

vs.

WILLIAM WILSON, Defendant

(Defendant) Appellee

WILLIAM WILSON, Plaintiff

vs.

vs.

ARTHUR V. JENSON et al.

(Defendant) Appellee

WILLIAM WILSON, Plaintiff

vs.

25250 I.A. 602

WILLIAM WILSON, Plaintiff
vs.
ARTHUR V. JENSON et al., Defendant

By this appeal, William Wilson, as trustee, seeks to re-

verse an order and decree entered by the Superior Court of Cook

County on July 20, 1911, by which it was ordered and decreed that

the receiver pay to the complainant, Arthur V. Jensen, \$100.00.

The record discloses that on June 20, 1909, the complainant,

Wilson, filed a complaint in which he alleged that Jensen

had wrongfully obtained possession of certain real estate which

he claimed to own, and that Jensen had been wrongfully

deprived of the same, and that Jensen was in possession of the same

and that the complainant was entitled to the same, and that

he sought to recover the same, and that the receiver was appointed to take

charge of the real estate, and that the receiver was appointed to take

charge of the real estate, and that the receiver was appointed to take

charge of the real estate, and that the receiver was appointed to take

charge of the real estate, and that the receiver was appointed to take

charge of the real estate, and that the receiver was appointed to take

charge of the real estate, and that the receiver was appointed to take

charge of the real estate, and that the receiver was appointed to take

the instant suit and procured an order to be entered directing the receiver to pay him, out of the moneys collected by the receiver, certain specified sums which were due and payable on account of the indebtedness secured by the trust deed. The order provided that these payments were to be made monthly until the 15th day of June, 1930, or until the further order of the court. In accordance with this order, the receiver made a number of payments to Firebaugh, trustee, aggregating more than \$4,000. All of the payments were not made as required by the order, and on August 8, 1930, Firebaugh filed another intervening petition, setting up the payments ordered to be made by the receiver as above stated, that the receiver had made no payments since April 17, 1930, and praying that the receivership be extended to cover the foreclosure suit. An order was entered accordingly.

On December 23, 1930, a decree was entered in the foreclosure suit. In the decree the court found that the receiver in the instant case had money in his hands which he had collected as rents from the premises, that they had been specifically pledged to pay the indebtedness secured by the trust deed, and it was ordered and decreed that the receiver be continued until the sale of the real estate under the decree and until the further order of court. The indebtedness found to be due in the foreclosure decree not having been paid, the property was sold and a deficiency decree entered April 8, 1931, of which more than \$16,000 remains unpaid. The deficiency decree contains the following: "It is further ordered and adjudged that all moneys in the hands of the North Town State Bank, a corporation, the Receiver herein, and all moneys coming into the hands of said Receiver, shall be applied from time to time under the order of this court in payment of deficiency due Complainant."

The instant case was referred to a master in chancery who took the evidence, made up his report and recommended that an order

The instant case was referred to a master in chancery who
 the order of this court in payment of delinquent tax liability.
 hands of said receiver, shall be applied from time to time under
 a corporation, the receiver herein, and all moneys coming into the
 adjusted that all moneys in the hands of the North Town State Bank,
 attorney herein continue the following: "It is further ordered and
 April 3, 1937, at which time said \$10,000 remains unpaid. The de-
 been paid, the receiver was said and a deficiency decree entered
 instant case found to be due to the receiver decree not having
 State and the decree and until the further order of court. The
 decrees that the receiver be continued until the sale of the real
 the instant case secured by the court fees, and it was ordered and
 from the proceeds, that there had been specifically pledged to pay
 instant case had money in all hands which he had collected as rents
 suit. In the decree the court found that the receiver in the in-
 suit. In the decree the court found that the receiver in the in-
 suit. In the decree the court found that the receiver in the in-

On December 15, 1937, a decree was entered in the foreclosing
 taxed accordingly.

ship be ordered to cover the foreclosing bill. An order was en-
 made no payments since April 17, 1937, and stating that the receiver-
 to be made by the receiver as above stated, that the receiver had
 filed another intervening petition, setting up the payments ordered
 not made as required by the order, and on August 5, 1937, although
 trustee, and although with same \$10,000. All of the payments were
 this order, the receiver only a number of payments to the bank,
 1930, or until the further order of the court. In accordance with
 these payments were to be made monthly until the 15th day of June,
 instant case secured by the court fees. The order provided that
 independent secured by the court fees. The order provided that
 certain specific payments were to be made on account of the
 receiver to pay his debt of the moneys collected by the receiver,
 the instant case and provided an order to be entered directing the

be entered that the rents in the hands of the trustee which were collected prior to August 8, 1930, be turned over by the receiver to Russell Firebaugh, trustee, holding that the decree entered in the foreclosure suit had adjudicated the matter. The Chancellor sustained exceptions to the report and on July 29, 1931, a decree was entered in the instant case. The Chancellor held that the complainant, Erickson, by reason of his diligence in having a receiver appointed, was entitled to the rents in the hands of the receiver which he had collected prior to August 8, 1930, the date on which the receivership was extended to the foreclosure suit. In this we think the Chancellor erred, because it had been specifically decreed in the foreclosure suit that all moneys then in the hands of the receiver and all moneys thereafter coming into his hands should be applied by the receiver towards the payment of the deficiency decree. Complainant was made a party to the foreclosure suit and made no complaint to the decree entered in that case, and the matter there having been adjudicated he cannot afterwards complain that he was not awarded rents in the hands of the receiver collected prior to August 8, 1930.

The decree of the Superior court of Cook county is reversed and the cause remanded with directions to enter a decree in accordance with what we have stated in this opinion. The abstract of record is substantially a transcript of the record and is to a great extent unnecessary to present the questions involved. The cost of the abstract will therefore be taxed one-half to the complainant, Erickson, and one-half to Firebaugh, trustee.

REVERSED AND REMANDED
WITH DIRECTIONS.

Katchett, J., concurs.

McSurely, J., dissents.

35530

MR. JUSTICE McSURELY Dissenting: I am of the opinion that the decretal order referred to could apply only to moneys coming into the hands of the receiver from the date of his appointment in the foreclosure proceedings. The two receiverships are separate and distinct and the court could not properly enter an order in the foreclosure proceedings alone which would affect the receivership in the other proceedings.

Mr. Justice G. J. Williams: I am of the opinion that

the decision order returned to date only to money coming
into the hands of the receiver from the sale of his appointment
in the receivership proceedings. The two receiverships are separate
and distinct and the court could not properly enter an order
in the receivership proceedings which would affect the receiver-
ship in the other proceedings.

35614

JAMES H. HOOPER,
Plaintiff in Error,

vs.

GEORGE BIRKENSTEIN,
Defendant in Error.

527
ERROR TO MUNICIPAL COURT
OF CHICAGO.

265 I.A. 603¹

MR. PRESIDING JUSTICE O'CONNOR
DELIVERED THE OPINION OF THE COURT.

On May 2, 1928, plaintiff, claiming to be the owner of certain real estate in Chicago located at Kenmore and Hollywood avenues, Chicago, brought suit against the defendant, one of the tenants of the property, which consisted of 18 apartments, to recover \$185.00 claimed to be due him for rent for the month of May, 1928. There was a trial before the court without a jury, and a finding and judgment in defendant's favor and plaintiff prosecutes this writ of error.

The facts as to the ownership of the property by plaintiff have been before this court on a number of prior occasions, and in an opinion rendered by the Second division of this court, filed July 3, 1929, it was held that plaintiff's title to the property was void. Hooper v. Becker, 254 Ill. App. 606. Cartierari was denied in this case by the Supreme court. In another opinion filed by the same division of this court on October 9, 1931, the facts involved are set forth with considerable detail, in which opinion it is again distinctly stated that plaintiff's title to the property was void and that it had been so adjudicated. Becker v. Hooper, 263 Ill. App. 18. And on November 9, 1931, we filed two opinions in which we followed the opinions and judgment of the Second division in the cases above mentioned and held that plaintiff's title was void. Hooper v. Klipper, No. 35063, and Hooper v. Cohen, No. 35198.

It would seem that these opinions and decisions ought to

JAMES H. COOPER, Plaintiff in Error,

vs.

GEORGE BIRKENHEIM, Defendant in Error.

APPEAL FROM JUDICIAL COUNCIL

OF CHICAGO.

Set 1A. 003

THE CHICAGO JUDICIAL COUNCIL
HOLDING THE OPINION OF THE COURT.

ON May 1, 1934, Plaintiff, claiming to be the owner of certain real estate in Chicago located at Lawrence and Hollywood avenues, Chicago, brought suit against the defendant, one of the tenants of the property, which consisted of 12 apartments, to recover \$100.00 claimed to be due him for rent for the month of May, 1934. There was a trial before the court without a jury, and a finding and judgment in defendant's favor and plaintiff process this writ of error.

The facts as to the ownership of the property by plaintiff have been before this court on a number of prior occasions, and in an opinion rendered by the second division of this court, filed July 3, 1930, it was held that plaintiff's title to the property was void. Cooper v. Birkenheim, 231 Ill. App. 606. Cooper was denied in this case by the second division. In another opinion filed by the same division of this court on October 9, 1931, the facts involved were set forth with considerable detail, in which opinion it is again affirmatively stated that plaintiff's title to the property was void and that it had been so adjudicated. Becker v. Cooper, 235 Ill. App. 101. And on November 9, 1931, we filed two opinions in which we affirmed the findings and judgment of the second division in the cases above mentioned and held that plaintiff's title was void. Cooper v. Birkenheim, No. 30661, and Becker v. Cooper, No. 30106.

It would seem that these opinions and decisions ought to

have been sufficient information to plaintiff that it had been repeatedly adjudicated that his title to the property was void, yet we find him in the instant case again prosecuting a writ of error and still endeavoring to collect rents from the premises to which we have repeatedly held he has no claim.

The judgment of the Municipal court of Chicago is affirmed.

JUDGMENT AFFIRMED.

McSurely and Matchett, JJ., concur.

have been collected information as to whether it had been re-
cently adjusted that his title to the property was valid, yet
we find him in the instant case again procuring a writ of error
and still endeavoring to call of notice from the premises to which
we have repeatedly said he has no claim.

The judgment of the appellate court of Chicago is affirmed.
JUDGMENT AFFIRMED.

Respectfully and obediently, J. J. COLEMAN.

35660

LOUIS RITT, NATE JOHNSON and FRED
MARVIN, for use of PERSONAL LOAN
& SAVINGS BANK, a Corporation,
Appellant,

vs.

CHICAGO SHOW PRINTING COMPANY,
a Corporation,
Appellee.

537
APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

265 I.A. 603²

MR. PRESIDING JUSTICE O'CONNOR
DELIVERED THE OPINION OF THE COURT.

Judgment by confession was entered by the Municipal court of Chicago in favor of plaintiff, the payee of a promissory note, and against the defendant maker. An execution was issued and returned no part satisfied. Afterwards plaintiff filed an affidavit for garnishee summons against the Chicago Show Printing Company, a corporation, and it was summoned as garnishee. A conditional judgment was entered against it and afterwards a scire facias served on it to make the judgment final. The scire facias was returnable on May 14, 1931, and on the same day an order was entered giving the garnishee ten days from that time to answer. May 27th, which was three days after the passage of the time within which the garnishee was ruled to answer, it filed its answer and two days later the garnishee was defaulted for failure to answer, the answer filed being apparently ignored, and judgment was entered against the garnishee for \$338.50.

So far as the record discloses nothing further was done until August 7th following, when, pursuant to notice, the garnishee filed its verified petition supported by an affidavit, and moved the court to vacate the judgment entered against it on May 29th. The motion was sustained and the judgment vacated and it was "Further ordered by the Court that leave be and the same is hereby given

WILLIAM H. HART, SENATOR AND
MEMBER, FOR ONE OF THE
& SAVINGS BANK, A CORPORATION,
Applicant,

APPEAL FROM HONORABLE COURT

OF ILLINOIS.

CHICAGO NEWS PRINTING COMPANY,
A Corporation,
Respondent.

28811. A. 603

DELIVERED THE VERIFICATION OF THE COURT.

judgment by conviction was entered by the municipal court of Chicago in favor of plaintiff, the jury of a preliminary note, and against the defendant. An execution was issued and returned on past judgment. Defendant plaintiff filed an affidavit for garnishment summons against the Chicago News Printing Company, a corporation, and it was returned as garnished. A conditional judgment was entered against it and it was returned as garnished. It is to note the judgment filed. The same filing was returned on May 14, 1931, and on the same day an order was entered giving the garnishment ten days from that time to answer. May 27th, which was three days after the return of the same which the garnishment was ruled to answer, it filed its answer and two days later the garnishment was defaulted for failure to answer, the answer filed being apparently ignored, and judgment was entered against the garnishment for \$500.00.

So far as the record discloses nothing further was done until August 27th following, when, pursuant to notice, the garnishment filed its verified petition supported by an affidavit, and moved the court to vacate the judgment entered against it on May 27th. The motion was sustained and the judgment vacated and it was further ordered by the court that leave be and the same is hereby given

garnishee to file answer instantler.

"Garnishee, Chgo. Show Printing Co., a corp., answers no funds. Plaintiff contests answer."

Six days later, August 13th, another order was entered as follows: "Now comes the plaintiff herein and moves the Court that the answer of the garnishee be stricken from the files of this cause, which motion the Court sustains. It is ordered by the Court that a rule be entered on garnishee to file an amended answer in five (5) days." On the next day the garnishee filed an answer in which it set up that it had no funds belonging to the judgment debtor. The next that appears is on August 21st, when the court entered the following order: "Now comes the plaintiff and prays an appeal from the order of August 7th, 1931, to the Appellate Court in and for the First District of Illinois," which appeal was granted on condition that plaintiff file a bond and bill of exceptions within 30 and 60 days respectively.

Plaintiff's position is that the order of court entered August 7th, vacating the judgment entered against the garnishee, was unwarranted because the petition and supporting affidavit did not show sufficient grounds under section 21 of the Municipal Court Act or section 89 of the Practice Act. It further contends that the proper procedure was not followed by the trial court because the court passed on the garnishee's motion to vacate the judgment upon reading the petition and affidavit without ruling the plaintiff to answer.

To raise the question of the sufficiency of the motion made under section 89 of the Practice act or under section 21 of the Municipal Court act, it is the proper practice to demur to the motion by plea of nullo est eratum, by motion to strike, by pleading special matter in confession and avoidance, or by making an issue of

gratified to this court's decision.

"The court, in its opinion, has said that the court is

not bound by the court's decision."

It is true that the court's decision is not binding on the court.

However, the court's decision is not binding on the court's decision. The court's decision is not binding on the court's decision.

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It is true that the court's decision is not binding on the court's decision.

fact by traversing the motion. People v. Crooks, 326 Ill. 266. While no formal rule was entered on the garnishee to demur, plead or answer, yet we must presume the court treated the question as though a demurrer had been filed so as to raise the question of the sufficiency of the petition. But we think plaintiff is not in a position to raise these questions here, because when on August 7th the court entered the order sustaining the garnishee's motion and vacated the judgment, it was ordered that the garnishee be given leave to file an answer instanter and the record discloses that the garnishee answered that it had no funds belonging to the judgment debtor and that plaintiff contested the answer, and six days later the plaintiff went into court and procured an order to be entered striking the answer of the garnishee from the files and the garnishee was again ruled to file an amended answer within five days. It was not until August 21st that the defendant prayed an appeal from the order of August 7th. The order of August 7th was a final and appealable order, from which the plaintiff should have appealed without having taken affirmative action, which in effect, treated the order vacating the judgment as valid and binding. In these circumstances plaintiff is estopped from now questioning the correctness of the order which vacated the judgment.

The order of the Municipal court appealed from is affirmed.

ORDER AFFIRMED.

McSurely and Matchett, JJ., concur.

fact by traversing the matter. People v. Grimes, 128 Ill. 422.

While no formal issue was framed on the question as to whether, yet we must discuss the court's question as to whether a demurrer had been filed as to raise the question of the sufficiency of the petition. And we think definitely in favor

in a petition to return writs of habeas corpus, because when on August 7th the court entered the order annulling the writs, the motion and vacated the judgment, it was evident that the petitioners had given leave to file an answer, and the record discloses that the petitioners answered, but it had no legal effect in the fact that the writs were not set aside and granted in order to be entered annulling the writs of the petitioners from the files and the writs were again noted as filed on amended answer within

five days. It was not until August 7th that the defendant prayed an appeal from the order of August 7th. The order of August 7th was a final and unreviewable order, from which the plaintiff should have appealed without having taken any affirmative action, which in effect, treated the order vacating the judgment as valid and binding. In these circumstances plaintiff is estopped from now questioning the correctness of the order which vacated the judgment.

The order of the municipal court appealed from is affirmed.

JOHN W. BAKER.

McDonnell and Ketchum, Ill., counsel.

35325

MARY F. MOORE,
Plaintiff in Error.

vs.

SYLVESTER GRAVES,
Defendant in Error.

547
ERROR TO MUNICIPAL COURT
OF CHICAGO.

265 I.A. 603³

MR. JUSTICE MESURELY DELIVERED THE OPINION OF THE COURT.

This is a landlord and tenant case in which plaintiff^{first} had a judgment by confession for \$68 and attorney's fees, for rent alleged to be due under a written lease for December, 1930. Later, leave was given to the defendant to make a defense and the case was heard by the court without a jury. The judgment entered by confession was vacated and judgment was entered for defendant. Plaintiff seeks a reversal. The judgment must be reversed and the cause remanded for another trial in order that the facts may be properly presented in evidence.

By the petition filed by the defendant asking that the judgment be vacated, it is alleged that the plaintiff had sworn out a warrant for the arrest of the defendant, claiming that defendant was damaging the plumbing in the rented premises; that plaintiff had ordered defendant to vacate, as she considered him an undesirable tenant; that upon the hearing of the charge against defendant before Judge Eberhardt of the Municipal court, it was suggested by the Judge that the matters in dispute between the parties should be settled by the defendant moving, which was agreed to, and the case was continued in order that defendant might carry out his agreement to vacate; that when the case again came before Judge Eberhardt, it was shown that defendant had moved from the premises and the case was dismissed. The trial court in the present case indicated that he would not permit the defendant to prove this. The defendant should have been permitted to show what happened

W. T. BROWN

Plaintiff in Error

TO THE HONORABLE COURT

OF CHICAGO

WILLIAM BROWN

Defendant in Error

252 I.A. 603

IN JUDICIAL PROCEEDINGS FOR THE COURT OF THE COUNTY

This is a petition and return made in which plain-

first

tiff filed a judgment by confession for \$100 and attorney's fees.

For want alleged to be due under a written lease for December,

1930. Later, leave was given to the defendant to make a defense

and the case was heard by the court without a jury. The judgment

entered by confession was vacated and judgment was entered for

defendant. Plaintiff seeks a reversal. The judgment must be re-

versed and the case remanded for another trial in order that the

facts may be properly presented in evidence.

By the petition filed by the defendant seeking that

the judgment be reversed, it is alleged that the plaintiff had

sworn out a warrant for the arrest of the defendant, claiming that

defendant was threatening his plaintiff in the rented premises; that

plaintiff had advised defendant to remove, as the defendant did

an unsatisfactory tenant; that upon the hearing of the charges against

defendant before Justice of the Municipal Court, it was

suggested by the Justice that the parties in dispute between the

parties should be settled by the defendant paying, which was agreed

to, and the case was continued to court that defendant might carry

out his statement to court; that when the case again came before

Judge Sherman, it was known that defendant had moved from the

premises and the case was dismissed. The trial court in the present

case indicated that he would not permit the defendant to prove this.

The defendant should have been permitted to show what happened

before Judge Eberhardt, and that he vacated the premises pursuant to an agreement entered into at that time.

Defendant testified he moved out on December 1st, and that plaintiff had asked him to move. Plaintiff testifying, was asked to give her version of this conversation, but the court ruled that he was "not interested in that." If there was an agreement between the landlord and tenant that he should move, and defendant did move pursuant to the agreement, there was a surrender of the premises and plaintiff cannot recover rental for a subsequent period. Brewer v. National Union Building Association, 166 Ill. 221; Automobile Supply Co. v. Scene-In-Action Corp., 340 Ill. 196; Alschuler v. Schiff, 164 Ill. 298; Williams v. Vanderbilt, 145 Ill. 238.

It appears that plaintiff re-rented the premises to other tenants for a term commencing with December, but apparently she made concessions to the new tenant for this month.

In order that the facts may be fully developed upon a second trial, the judgment is reversed and the cause is remanded.

REVERSED AND REMANDED.

O'Connor, P. J., and Hatchett, J., concur.

before Judge Stewart, and that he was the witness present
to an agreement entered into at that time.

Defendant testified he moved out on December 1st, and
that Plaintiff had moved out to move. Plaintiff testified, was

asked to give her version of this conversation, and the court
ruled that he was "not interested in that." It seems that an

agreement between the landlord and tenant that he should move, and
defendant did not intend to do so, there was a con-

tract of the premises and defendant cannot remove tenant for a
lease term period. Green v. Williams, 111 Ill. 2d 125, 126.

Ill. 125 Ill. 2d 125, 126; Green v. Williams, 111 Ill. 2d 125, 126; Williams v.

Williams, 111 Ill. 2d 125, 126.
It appears that Plaintiff requested the premises to

other tenants for a term commencing with defendant, but apparently
the same conclusion is not reached for this month.

In other cases the issue may be fully resolved upon
a second trial, the judgment is reversed and the case is remanded.

REVEREND AND HONORABLE.

O'Connor, J., and others, J., concur.

35421

JOHN A. PETERS,
Appellee,

vs.

FRED BECKLENBERG and WELLINGTON
APARTMENT BUILDING CORPORATION,
Appellants.

557
APPEAL FROM CIRCUIT COURT

OF COOK COUNTY.

265 I.A. 603⁴

MR. JUSTICE McSURRELY DELIVERED THE OPINION OF THE COURT.

Complainant filed a bill to establish a mechanic's lien for labor and materials furnished to the defendant Building Corporation, of which defendant Becklenberg is the directing head. The cause was referred to a master to take evidence and he reported, recommending that a lien be allowed. Exceptions were overruled and a decree entered finding that complainant was entitled to a mechanic's lien for approximately \$11,512, with interest. Defendants appeal.

The crucial question relates to a waiver of lien given by complainant on April 22, 1927, which purports to be a waiver for all labor and materials "furnished or which may be furnished." Complainant, by an amended bill, alleged that this was executed and delivered by mutual mistake and contrary to the intention of complainant and defendants, which was that it should be a partial waiver. Complainant asked that it be corrected. Defendants deny that a mistake was made and stand upon the language of the waiver. The master found that through an error of the scrivener who prepared the waiver, it purported to waive a lien on account of labor or material furnished or to be furnished, whereas it was the intention that it should be a partial waiver to the extent of the payment made. The decree entered was to the same effect.

We are of the opinion the evidence justified this conclusion. Before April 22, 1927, partial waivers were given by

JOHN A. T. EN, Appellee,

vs.

TRUD BROOKLYN and BRANTON
APARTMENT BUILDING CORPORATION,
Appellants.

APPEAL FROM CIRCUIT COURT

OF COOK COUNTY.

265 I.A. 603

MR. JUSTICE MCKENNA DELIVERED THE OPINION OF THE COURT.

Complaint filed a bill to establish a mechanic's lien for labor and materials furnished to the defendant building corporation, of which defendant is the sole owner and head. The case was referred to a master to take evidence and he reported, recommending that a lien be allowed. Exceptions were overruled and a decree entered stating that complaint was entitled to a mechanic's lien for approximately \$11,812, with interest. Defendant appeals.

The original complaint refers to a waiver of lien given by complainant on April 28, 1937, which purports to be a waiver for all labor and materials "furnished or which may be furnished." Complainant, by an amended bill, alleged that this was executed and delivered by mutual mistake and contrary to the intention of complainant and defendant, which was that it should be a partial waiver. Complainant asked that it be corrected. Defendant deny that a mistake was made and stand upon the language of the waiver. The master found that there was an error of the scrivener who prepared the waiver, it purported to waive a lien on account of labor or material furnished or to be furnished, whereas it was the intention that it should be a partial waiver to the extent of the payment made. The decree entered was to the same effect.

We are of the opinion the evidence justified this conclusion. Before April 28, 1937, partial waivers were given by

complainant as the work progressed. On April 21st complainant and Becklenberg had a conversation in which complainant asked for a payment on account and Becklenberg told him he thought he could bring him \$3,000 and asked complainant to bring a waiver. A clerk in the employ of the Riech Paint Company, which furnished some of the materials, drew the waiver in question. He testified that complainant asked him to make out a "partial" waiver and he filled out a printed form. This clerk said that he did not understand what a partial waiver meant, as he had not made out any waivers of lien prior to this time. This is corroborated by the testimony of complainant, who said that he asked the clerk to make out a partial waiver, which complainant signed without reading and it was put in an envelope and mailed. Complainant testified that he assumed it was in proper form for a partial waiver and that he did not know it was a full waiver and included waiver for future work. The testimony of defendant Becklenberg is consistent with this version of the matter.

Furthermore, the surrounding circumstances indicate that the parties did not intend that it was to be a waiver in full and for future work. After allowing all credits defendants were indebted on April 22, 1927, to complainant in the sum of \$9184.49. Complainant continued to work for some time after this date and furnished additional labor and materials of the value of \$2328.01.

It is highly improbable that complainant would settle his lien rights to over \$9000 and also his right to a lien for additional labor and materials to the extent of over \$2000, aggregating over \$11,000, for the payment of \$3000.

The decree properly found that there was a mutual mistake in the wording of the waiver of April 22nd. It is well established that where, by the mistake of a scrivener, the instrument does not speak the true intention of the parties, equity will

complaint as the one proposed. On April 1st complaint and
 Beckenbush had a conversation in which Beckenbush asked for a
 payment on account and Beckenbush said that he thought he could
 bring him \$5,000 and asked Beckenbush to bring a waiver. A check
 in the name of the Alaska Lumber Company, which furnished some of
 the materials, drew the waiver in question. He testified that Beck-
 enbush asked him to make out a "partial" waiver and he filled out
 a printed form. This check was sent to him and he understood what a
 partial waiver meant, as he had not made out any waivers of his
 prior to this time. This is corroborated by the testimony of Beck-
 enbush, who said that he asked the clerk to make out a partial
 waiver, which Beckenbush signed without reading and it was put in
 an envelope and mailed. Beckenbush testified that he knew
 was in return for a partial waiver and that he did not know
 it was a full waiver and Beckenbush never for future work. The
 testimony of Beckenbush Beckenbush is consistent with this version
 of the matter.

Furthermore, the very nature of the circumstances indicate
 that the parties did not intend that it was to be a waiver in full
 and for future work. After allowing all credits debentures were
 indicated on April 1st, 1935, to comply with the act of 1934-35.
 Complaint continued to work for some time after this date and
 furnished additional labor and materials at the value of \$23,150.01.
 It is also probable that Beckenbush would settle
 his claim with the over \$2000 and also his right to a claim for
 additional labor and materials to the extent of over \$2000, after
 getting over \$11,000 for the payment of \$2000.

The above properly shows that there was a mutual
 mistake in the wording of the waiver of April 1st. It is well
 established that where, by the mistake of a scrivener, the instru-
 ment does not express the true intention of the parties, such will

reform the instrument of the parties. Krabbenhoft v. Gussau, 337 Ill. 396; Froyd v. Schultz, 260 Ill. 268; Carter v. Barnes, 26 Ill. 455; McLennan v. Johnston, 60 Ill. 306; Schwass v. Hershey, 125 Ill. 653.

Defendants question the method followed by the master in establishing the measure of damages. The contract was terminated by the defendants, as the master found. It provided for the payment of a lump sum for all the work and materials furnished. This was modified by four contracts entered into on subsequent dates. Neither the contract nor the modifications contain any provisions whereby it could be shown what any specific labor or materials were worth, hence complainant introduced evidence to show what they were reasonably worth. This method has been approved in Lincoln v. Schwartz, 70 Ill. 134, and in Jobst v. City of Danville, 212 Ill. App. 571. In the latter case it was said: "Where the performance of a contract by the contractor has been prevented by the other party, and the work done up to that time has been in compliance with the contract, and there is nothing in the contract by which the compensation for the part performed can be determined, the measure of damages is the reasonable value of the work done and the material furnished." Defendants offered no proof to show that the theory for measuring the damages, proposed by them, would have been any more favorable to them than the theory followed by the master and approved by the chancellor.

The decree provided that interest at 5 per cent on the amount found due should be allowed from May 6, 1927, the date of the last work done by complainant. There was abundant evidence that complainant repeatedly requested payment due on the balance of his contract; that at one time defendant Becklenberg checked his bill for this and promised that complainant would "hear from me soon." There was no proof to controvert the amount due complain-

123 456

...and the fact that the ...

ant, the defendants relying upon the provisions of the waiver of April 22nd. The Mechanic's Lien Statute, chapter 52, section 1, provides that the mechanic shall have a lien for the labor and materials furnished and interest from the date the same was due. We are of the opinion that the decree properly allowed interest.

The decree does justice in the matter and it is affirmed.

AFFIRMED.

O'Connor, P. J., and Hatchett, J., concur.

and, the defendant relying upon the provisions of the latter
of April 1904. The defendant's plea is that, under 22, section
1, provides that the defendant shall have a lien for the labor and
materials furnished and interest thereon for the time and place where the
work is of the opinion that the facts presented are of interest.
The facts are stated in the matter and it is

affirmed.

ATTESTED.

O'Connor, J. J., and Alexander, J., circuit.

35433

ELEANOR KOSAKOWSKI, Administratrix
of the Estate of John Kosakowski,
Deceased,

Appellee.

vs.

PURE FARM PRODUCTS CORPORATION,
Appellant.

APPEAL FROM SUPERIOR
COURT OF COOK COUNTY.

265 I.A. 604

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

On the morning of March 20, 1930, John Kosakowski, hereafter called plaintiff, was riding with four other men in a Buick automobile going southward, when it collided with a north bound milk motor truck belonging to defendant. Plaintiff was killed in the collision. His wife was appointed administratrix and, bringing suit, had a verdict and judgment for \$10,000. Defendant appeals.

It is earnestly argued by defendant that the verdict is contrary to the weight of the evidence. The five men, including plaintiff, were in a car belonging to and driven by Everett Anderson. They were going to Cicero where they were employed. The accident happened north of the village limits of Deerfield, Illinois, at about 6:30 a. m. Although one of the witnesses testified it was a dark and foggy morning, the other witnesses say it was clear and the sun shining. The paved roadway is about 18 feet wide and at this point curves sharply to the right as one goes south, and there is an incline in the roadway from the east to the west of 28 inches. A white line indicates the center of the road. As the Buick was rounding the curve going south, the defendant's truck was passing alongside going north. As they passed they collided. Defendant argues that this occurred because the Buick was being driven with its left wheels several inches east of the white line in the center of the road, and refers to the rule of the road

ALABAMA DEPARTMENT OF HIGHWAYS
OFFICE OF THE COMMISSIONER
MONTGOMERY, ALABAMA

STATE OF ALABAMA
COUNTY OF COCA

265 I.A. 604

MR. JUSTICE ROBERTSON, JUDGE OF THE COURT.

On the morning of March 25, 1930, John Robertson, hereafter called plaintiff, was riding with four other men in a Buick automobile being driven by defendant, when it collided with a motor coach with motor truck behind it. Plaintiff was killed in the collision. His wife was appointed administratrix and, praying suit, had a verdict and judgment for \$10,000. Defendant moves.

It is generally agreed by defendant that the verdict is contrary to the weight of the evidence. The five men, including plaintiff, were in a car belonging to and driven by Everett Anderson. They were riding to their home where they were employed. The accident happened north of the village limits of Decatur, Illinois, at about 8:30 A. M. Although one of the witnesses testified it was a dark and foggy morning, the other witnesses say it was clear and the sun shining. The paved highway is about 14 feet wide and at this point curves sharply to the right as one goes south, and there is no incline in the roadway from east to the west of 20 inches. A white line indicated the center of the road, as the Buick was traveling the north-south, the defendant's truck was passing alongside going north. As they passed they collided. Defendant alleges that this occurred because the Buick was being driven with the left wheels several inches east of the white line in the center of the road, and refers to the hole in the road

which requires every person operating or driving a vehicle on a paved or hard surfaced road, such as this was, to keep to the right of the center line whenever practicable. Chapter 121, section 161, Illinois Statutes (Cahill.)

Plaintiff says the accident happened because the driver of defendant's truck went so near the center line that the curve and incline in the road towards the west at this point threw the upper part of the truck over into the way of the south bound Buick, tearing off the upper part of the Buick and striking plaintiff, who was sitting in the rear seat on the left side.

All of the four men riding in the Buick testified substantially that they were going southward at about 30 miles an hour, following behind a large truck which was going in the same direction. They were about 30 feet behind it when defendant's milk truck was coming north past the south bound Buick, and Anderson testified that he saw the rear end of the milk truck "sweeping towards" the Buick. They all say that at no time was the Buick east of the center of the road. Another witness, Herman Huehl, who lived near by, testified that he saw the accident; that the Buick automobile was travelling on the right side of the road about 12 to 15 inches west of the center line; that the defendant's truck came from the south, and as it passed the Buick the drop in the roadbed to the west was so steep that it raised the easterly wheels of the truck so high that it threw the box of the truck over into the west side of the road, striking and ripping off the top of the Buick. The milk truck is the ordinary size of a box car truck.

The driver of defendant's truck testified that when the Buick came in contact with his truck his truck was about 14 inches east of the center of the road, and that at no time was the truck west of the center line; that as they passed, the Buick

which requires very close attention or driving a vehicle on a
road or track, with a view to keep to the
right of the center line whenever practicable. Chapter III,
Section 161, Illinois Statutes (1911).

Witness said the accident happened because the

driver of defendant's truck went on down the center line that
the curve and inside in the road towards the west at this point
toward the upper part of the track over into the way of the south
bound track, turning off the lower part of the track and crossing
the track, who was driving in the road west on the left side.

All of the time when riding in the truck testified

approximately that they were going southward of about 30 miles
an hour, following behind a large truck which was going in the
same direction. They were about 50 feet behind it when defend-
ant's milk truck was coming north over the south bound track, and

Anders testified that he saw the rear end of the milk truck

"swinging across" the track. They all say that at the time was

the back end of the truck of the road. Another witness, James
Smith, who lived near by, testified that he saw the accident; that
the milk truck was travelling on the right side of the road
about 15 to 20 feet west of the center line; that the defendant's

truck came from the north, and as it passed the milk truck in

the roadbed to the west was so close that it turned the eastward

wheels of the truck so high that it threw the box of the truck

over into the west side of the road, striking and tipping off the

top of the Buick. The milk truck is the ordinary size of a box

car truck.

The driver of defendant's truck testified that when

the truck came in contact with his truck his truck was about 14

inches east of the center of the road, and that at no time was

the truck west of the center line; that as they passed, the milk

swung over to his side of the road and the back end of the Buick struck his truck at about its center. There was also in evidence certain skid marks on the road which defendant argues indicated that the Buick started to skid after it struck, from a point about eight inches east of the center line of the road. However, it was argued by plaintiff's counsel to the jury that when the body of the truck struck the Buick towards its front, the natural result would be to swing the front end of the Buick towards the west, the rear end going towards the east, across the center line. The conflicting versions of the occurrence were presented to the jury, who evidently accepted plaintiff's version. While we may have some mental reservations as to whether all the facts were accurately presented, yet we cannot say that the conclusion of the jury is manifestly against the weight of the evidence.

Defendant complains of plaintiff's given instruction No. 5, which is a verbatim statement of the statute which provides that, whenever the death of a person shall be caused by the wrongful act of another, the jury shall give such damages as shall be fair and just compensation to the wife or next of kin, not exceeding the sum of \$10,000. This instruction merely informs the jury that a right to bring the action is granted by the statute and that the limit of any recovery is \$10,000. This instruction has been approved in Deming v. City of Chicago, 321 Ill. 341, and in Foreman Trust & Savings Bank v. South Suburban Motor Coach Co., Inc. 34409, opinion filed in this court April 15, 1931, in which certiorari was denied by the Supreme court.

Plaintiff's given instruction No. 12 is earnestly criticized. It reads: "Even though you believe from the evidence that the driver of the automobile in which John Kosakowski was riding was negligent in the manner in which he managed and drove

being over to the left of the road and the back end of the truck
 struck his truck at about the center. There was also in evidence
 certain skid marks on the road which defendant argues indicated
 that the truck started to slide after it struck, from a point
 about eight inches west of the center line of the road. However,
 it was argued by plaintiff's counsel in the jury room that the
 body of the truck struck the truck towards its front, the actual
 result would be as striking the front end of the truck towards the
 west, the rear end being towards the east, across the center line.
 The conflicting versions of the occurrence were presented to the
 jury, the plaintiff's version of plaintiff's version. While we may
 have some mental reservations as to whether all the facts were
 accurately presented, yet we cannot say that the conclusion of
 the jury is manifestly against the weight of the evidence.
 Defendant complains of plaintiff's given instruction
 No. 2, which is a verbatim statement of the statute which provides
 that, whenever the death of a person shall be caused by the wrongful
 act of another, the jury shall give such damages as shall be fair
 and just compensation to the wife or next of kin, not exceeding
 the sum of \$10,000. This instruction merely informs the jury that
 a right to bring the action is created by the statute and that
 the limit of any recovery is \$10,000. This instruction has been
 approved in Hendrix v. City of Chicago, 231 Ill. 244, and in 1907-
 1908 Ill. App. 100. People v. Smith, 1907 Ill. App. 100, in which
 34409, opinion filed in said court April 10, 1907, in which
certiorari was denied by the Supreme Court.
 Plaintiff's given instruction No. 11 is erroneously
 criticized. It reads: "Even though you believe from the evidence
 that the driver of the automobile in which John Henderson was
 riding was negligent in the manner in which he managed and drove

the automobile, such negligence of the driver, if any, cannot be imputed to nor charged against John Kosakowski, nor against the plaintiff, if you believe from the evidence that John Kosakowski, himself, was in the exercise of reasonable and ordinary care for his own safety, at and before the time of the accident in question."

It is said that this instruction in effect told the jury that no matter how negligent may have been the driver of the automobile in which plaintiff was riding, this would not affect plaintiff's right to recover, and that under this instruction, even if the Buick was on the wrong side of the highway, thereby coming in contact with defendant's truck, plaintiff could recover against defendant if he himself was in the exercise of reasonable care for his own safety.

We do not think the instruction should be so construed. It is a correct statement of the law, which is that one riding in an automobile cannot be held accountable for the negligence of the driver unless the passenger himself has been guilty of negligence contributing to the accident. Eckels v. Nuttschall, 230 Ill. 462.

Furthermore, this principle was stated in another way by defendant's given instruction No. 13, which was to the effect that, if the jury should find that the driver of the automobile in which deceased was riding was guilty of negligence "which was the sole cause of the accident" then the jury should find defendant not guilty. This is equivalent to saying that the negligence of plaintiff's driver could not be imputed to plaintiff. Defendant's given instruction No. 14 is much to the same effect, telling the jury that defendant cannot be found guilty if the negligence of the driver of the automobile in which plaintiff was driving was the sole cause of the death of plaintiff. Defendant's given instruction No. 20 also told the jury that there could be no recovery against defendant unless it was proven by a preponderance of the evidence that plaintiff was, immediately before and at the time of

the automobile, when defendant at the driver, it may, cannot be
located in any manner without some investigation, not against the
plaintiff, if you believe from the evidence that John Roseberry,
plaintiff, was in the exercise of reasonable and ordinary care for
his own safety, it may be that the time of the accident in question.
It is said that this investigation is after the fact that no
matter how negligent may have been the driver of the automobile in
which plaintiff was riding, this would not affect plaintiff's right
to recover, and that under this instruction, even if the jury was
on the wrong side of the question, merely because in contact with
defendant's truck, plaintiff could recover against defendant if he
himself was in the exercise of reasonable care for his own safety.
We do not think this instruction should be so construed. It is a
correct statement of the law, which is that one riding in an auto-
mobile cannot be held responsible for the negligence of the driver
unless the passenger himself has been guilty of negligence contrib-
uting to the accident. Robinson v. Robinson, 237 Ill. 467.
Furthermore, this stipulation was stated in another way by defend-
ant's given instruction No. 13, which was to the effect that, if
the jury should find that the driver of the automobile in which
defendant was riding was guilty of negligence "which was the sole
cause of the accident" then the jury should find defendant not
guilty. This is equivalent to saying that the negligence of
plaintiff's driver could not be imputed to plaintiff. Defendant's
given instruction No. 14 is much to the same effect, telling the
jury that defendant cannot be found guilty if the negligence of
the driver of the automobile in which plaintiff was driving was
the sole cause of the death of plaintiff. Defendant's given in-
struction No. 15 also tells the jury that there could be no recovery
against defendant unless it was proven by a preponderance of the
evidence that plaintiff was, immediately before and at the time of

the accident, in the exercise of ordinary care for his own safety. These three instructions, given at the instance of defendant, are consistent with plaintiff's given instruction No. 12. Where one party requests instructions to be given which are in substance the same as an instruction for the other party, of which complaint is made, he will not be heard to criticise the other instruction, Egbers v. Egbers, 177 Ill. 82.

The instruction criticised in Griffenhan v. Chicago Railway Co., 299 Ill. 590, is not like the instruction No. 12 under consideration. It was there held that the instruction there given assumed that defendant, the Railway company, was guilty of negligence and placed on it the burden of showing that the negligence of the driver of the colliding automobile was the cause of the injury, the court saying that any instruction which assumes these facts is wrong and the giving of it constitutes reversible error. This criticism is not applicable to the instant instruction.

The giving of a somewhat similar instruction was held reversible error in Opp v. Prider, 294 Ill. 538, but a reading of that opinion indicates that it was the circumstances involved which made the instruction misleading. It told the jury in substance that although the driver of the automobile did not exercise ordinary care for the safety of those in the automobile, yet the plaintiff, who was a guest passenger, might have been in the exercise of care for herself, although there was not the slightest evidence that she did anything at all; in view of the evidence in that case the instruction was wrong.

Instruction No. 12 is also criticised as eliminating from the jury the question as to whether the plaintiff and the driver of the automobile were engaged in a joint enterprise at the time. There was no evidence that they were so engaged. The automobile was owned by Anderson, who customarily took his four

The accident, in the exercise of judgment, was for his own safety. These three instructions, given to the jury, are consistent with plaintiff's instruction No. 12. There are party requests instructions to be given which are in substance the same as the instruction for the jury, of which complaint is made, he will not be held to criticize the other instruction.

Roberts v. Baker, 177 Ill. 32.

The instruction criticized in Roberts v. Baker

Roberts v. Baker, 177 Ill. 32., is not like the instruction No. 12 under consideration. It was there held that the instruction there given assumed that defendant, the railway company, was guilty of negligence and placed on it the burden of showing that the negligence of the driver of the colliding automobile was the cause of the injury, the court saying that such instruction which assumes these facts is wrong and the result is a reversible error. This criticism is not applicable to the instant instruction. The giving of a somewhat similar instruction was held

reversible error in Roberts v. Baker, 177 Ill. 32, but a reading of that opinion indicates that it was the circumstances involved which made the instruction misleading. It told the jury in substance that although the driver of the automobile did not exercise ordinary care for the safety of those in the automobile, yet the plaintiff, who was a guest passenger, might have been in the exercise of care for himself, although there was not the slightest evidence that he was anything at all; in view of the evidence in that case the instruction was wrong.

Instruction No. 12 is also criticized as all-inclusive

that the jury the question as to whether the plaintiff and the driver of the automobile were engaged in a joint enterprise at the time. There was no evidence that they were so engaged. The automobile was owned by Anderson, who customarily took his four

fellow workmen, including the plaintiff, from the place where they lived in North Chicago to the plant in Cicero where they were all employed - a distance of about forty miles. This had been going on for about four months. The men paid Anderson for this service, ordinarily giving him \$1 a day for the round trip. Negligence of a driver cannot be imputed to a person riding in the automobile unless there exists the relationship of master and servant or principal and agent. Honn v. Chicago City Ry. Co., 232 Ill. 378. Fisher v. Johnson, 238 Ill. App. 25. This last case is especially in point.

Defendant's last point is that the verdict was induced by an improper statement to the jury by counsel for plaintiff. This statement was to the effect that if defendant should be found liable, \$10,000 would be scant compensation. There is no complaint made that the verdict is excessive. Plaintiff was 42 years of age at the time of his death and left a widow and daughter whom he was supporting. He was in good health, earning \$60 a week. His expectation of life was shown to be more than 25 years. Under the circumstances the statement does not require a reversal. It was so held, under like circumstances, in Graham v. Mattoon City Ry. Co., 234 Ill. 483.

We see no convincing reason to reverse the judgment. It is therefore affirmed.

AFFIRMED.

O'Connor, P. J., and Hatchett, J., concur.

...fellow workers, including the plaintiff, from the place where they
lives in North Chicago at the time in question were they were all
employed - a distance of about forty miles. This had been going on
for about four months. ... was well known for this service,
ordinarily giving him a day for the round trip. Negligence of
a driver cannot be imputed to a person riding in the automobile
unless there exists the relationship of master and servant or
principal and agent. Wynn v. Chicago City Ry. Co., 232 Ill. 278.
Richard v. Johnson, 222 Ill. App. 28. This last case is especially
in point.

Defendant's last point is that the verdict was induced
by an improper statement of the jury by counsel for plaintiff.
This statement was to the effect that if defendant should be found
liable, \$10,000 would be a reasonable compensation. There is no complaint
made that the verdict is excessive. Plaintiff was 45 years of age
at the time of his death and had a wife and children whom he was
supporting. He was in good health, earning \$60 a week. His expec-
tation of life was shown to be about 25 years. Under the cir-
cumstances the amount does not require a reversal. It was so
held, under like circumstances, in Graham v. Graham City Ry. Co.,
232 Ill. App. 287.
We see no convincing reason to reverse the judgment.
It is therefore affirmed.

AFFIRMED.

O'Connor, J., and MacArthur, J., concur.

35446

LOUIS P. O'CONNELL,
Appellee,

vs.

STEVENS HOTEL COMPANY,
a Corporation,
Appellant.

57 7
APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

265 I.A. 604²

MR. JUSTICE MCBURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff, bringing suit to recover fees for legal services based upon an alleged contingent fee contract, had a verdict and judgment for \$37,500. Defendant asks for a reversal.

Plaintiff claims that he is entitled to recover upon an express contract with the defendant that he would receive as his fees for legal services in connection with proceedings in the County court of Cook county for the reduction of defendant's taxes for 1927, one-third of the amount of any reduction obtained; that in any event he is entitled to recover what the services were reasonably worth. Defendant asserts that it had no contract with plaintiff; that it never authorized or requested plaintiff to perform services for it and never ratified such services, and also that such a contract as alleged and testified to by plaintiff would be void for champerty.

It seems to be conceded that plaintiff had no direct contract with the defendant, but he argues that he was employed by Mr. Hugh Martin, an attorney for the defendant, under an implied authority of Martin to employ plaintiff on behalf of the defendant.

Defendant corporation was organized in 1924, and at about that time took title from James W. Stevens to the real estate on South Michigan avenue which it occupies. When defendant took title it proceeded with the erection of the buildings known as the Stevens Hotel. On April 1, 1927, the date for the fixing of valuations for

taxation, the hotel was in process of construction.

West & Eckhart are attorneys, practicing law in Chicago, and had represented James W. Stevens in all matters connected with taxation of this real estate since 1920, when he had acquired title. After the Hotel company had acquired title West & Eckhart had continued to represent it with reference to taxation matters.

James W. Stevens was chairman of the board of the Stevens Hotel company and Ernest J. Stevens was its president. The former was also chairman of the board of the Illinois Life Insurance company, which occupied a building at No. 1212 Lake Shore Drive. Hugh T. Martin was the general counsel of this Insurance company and had his offices in the building on Lake Shore Drive. He acted from time to time as attorney for the defendant, when so employed. He, also had other clients. He, with West & Eckhart, acted as attorneys for the defendant in connection with its real estate taxes for the year 1927, representing it before the board of assessors and the board of review. Through their efforts the valuation of defendant's property for taxing purposes for the year 1927 was very substantially reduced.

Plaintiff at the time of the trial was 35 years of age, and had been employed for a time in the State's attorney's office of Cook county in connection with criminal matters, except for the last six months in this office when he was in the tax department. In 1926 he had severed his connection with this office and continued the practice of law, independently specializing in special assessment and real estate taxes in the County court. In the early spring of 1928 plaintiff acquired some information from P. L. Crawford & Company, certified accountants who had done some work for defendant, concerning the valuations on the defendant's hotel property. From this, plaintiff was of the opinion that defendant's taxes could be reduced and through Mr. Crawford secured an

...was in process of construction.
...the building, according to the plan,
and had represented James E. ... in all matters connected with
... of this ... also 1920, when he had received title.
After the hotel ... and ... title was a ... had ...
... to represent it with reference to taxation matters.
James E. ... of the ... of the ...
Hotel ... and ... was its president. The former
was also chairman of the board of the ... with insurance com-
pany, which occupied a building at ... 1118 Lake Street Drive, ...
... was the general manager of this insurance company and had
his offices in the building on Lake Street Drive. He noted that
... also an attorney for the ... when so employed. He
also had other clients. ... with ... noted as at ...
for the defendant in connection with the real estate ... for the
year 1927, representing it before the board of assessors and the
board of review. ... after the valuation of ...
and a property for ... payment for the year 1927 was very sub-
stantially reduced.
... at the time of the trial was 35 years of age, and
had been employed for a time in the ... attorney's office of
Good agency in connection with ... matters, except for the
fact also wanted to his office when he was in the tax department.
In 1920 he had assumed the ... with this office and con-
tinued the practice of law, independently specializing in general
... and real estate cases in the County Court. In the early
spring of 1920 ... advised some ... from ...
Ford & Company, ... who had been with the
defendant, concerning the valuation on the defendant's hotel
property. From this, plaintiff was of the opinion that defendant
... a ... and ...

appointment with Martin. Pursuant to this appointment plaintiff called on Martin. These men differ as to what was said at this time, but at least it appears that plaintiff represented to Martin his belief that a saving of about \$100,000 could be made in defendant's taxes if defendant should employ him for this purpose, and Martin asked plaintiff as to his charges and was told that plaintiff was willing to undertake the work for a contingent fee of one-half of the amount of any reduction he might succeed in obtaining; he subsequently said he would take one-third. Martin says that at this time he told plaintiff that West & Eckhart were handling taxation matters for the defendant and that the defendant did not employ attorneys on a contingent basis and that he, Martin, was unable to employ him. Plaintiff says that Martin told him at this time that they expected to have a board meeting and that he, Martin, would get in touch with the plaintiff later. Plaintiff again called on Martin and offered to handle the case for one-third of the amount of reduction obtained and would handle expenses of the litigation out of his fee. Plaintiff was again referred to West & Eckhart.

Plaintiff called at the office of West & Eckhart and there talked with a Mr. Hassell, associated with that firm. Plaintiff and Hassell differ as to what was said in this and subsequent conversations. Hassell testified that he told plaintiff he did not think West & Eckhart would be interested in employing him as they already had in contemplation the filing of objections in the County court. Plaintiff presented his views as to the probability of securing a reduction and Hassell asked him what he had in mind in the way of fees and plaintiff informed him of his willingness to secure the reduction upon a contingent fee basis. Hassell testified that he then told plaintiff that his firm had been handling taxation matters for the Stevens for

conversation with Martin. According to this conversation, plainly
 called to Martin. There was a difference as to what was said at this
 time, but at least it appears that a similar conversation took place
 his belief that a saving of some \$100,000 would be made in delay-
 ing to make it. He stated that he was very sure of this, and
 Martin agreed to this. He also stated that he was very sure of this,
 and it was with this in mind that he was for a considerable time of con-
 sidering the matter of any delay. He might succeed in obtaining;
 He subsequently said he would have some delay. Martin says that at
 this time he said to Martin that he was very sure of this, and
 conversation between the two persons was that the delay would be not
 only a saving of some \$100,000 but also, Martin, was
 unable to delay at all. Martin says that Martin said to him at this
 time that he was very sure of this, and that he was very sure of this,
 would not be in a position to delay at all. Martin says that he
 in Martin and others to make the case for one-third of the
 amount of the delay was made and would make expense of the
 litigation out of his pocket. Martin was again referred to "not
 a delay."

Martin's belief at the office of Post & Schuyler and others
 talked with Mr. Russell, associated with that firm. Martin
 and Russell differ as to what was said in this and subsequent
 conversations. Russell testified that he said plainly to him
 not to take any delay and he was interested in saving his
 as they already had in contemplation the filing of a petition in
 the County Court. Martin, however, presented his views as to the
 probability of securing a remission and Russell asked him what
 he had in mind in the way of this and Martin informed him of
 his intention to secure the remission upon a condition that his
 fees, Russell testified that he then said plainly that his
 firm had been making a considerable amount of money for the purpose of

years and had never charged on any percentage basis and that this matter could not be charged on any contingent fee basis; that if he were employed by West & Eckhart he would have to agree that Mr. West would fix the amount of plaintiff's fee, which would be a reasonable proportion of the fee which West & Eckhart would charge the defendant; but that he, Hassell, would have to discuss the matter with Mr. West. Plaintiff told him to discuss it with West and inquired as to how much plaintiff would be paid, and he was told that he would get about \$2000 or \$3000, and that if plaintiff was satisfied with this he, Hassell, would discuss the matter with West, and that plaintiff replied, "all right then." Plaintiff disputes this version of the conversation. Plaintiff testified he then saw Martin and reported his conversation with West & Eckhart and Martin approved.

In July, 1928, objections were filed in the County court to the entry of judgment for taxes on the defendant's property; these objections were drawn in the office of West & Eckhart and signed by that firm; they were later heard in the County court in a trial lasting less than two hours, in which Hassell and plaintiff appeared. The trial resulted in a reduction of the tax from that assessed of \$189,305.25. As indicating the extent of the legal services required it should be noted that this was made under a rule of a fifty percent reduction adopted by the County court and applied generally in all such cases. The court stated in entering judgment that it gave the objector "the benefit of the fifty percent rule as given in all other cases." This suggests that anyone who knew that this rule was applied generally would have no difficulty in securing a reduction in this particular case. The county collector appealed to the Supreme court and on appeal the case was argued orally by a member of the firm of West & Eckhart. This appeal was subsequently dismissed, October 2, 1929.

October 4th plaintiff called at West & Eckhart's office and presented to Hassell a bill for his services, originally made out to West & Eckhart, but altered and the name New Stevens Hotel Corporation substituted. The bill was for "trial and legal services" \$75,000." The bill was in an enclosed envelope and Hassell put it in a drawer of his desk unopened. The following day Hassell wrote to plaintiff stating at some length his views of the arrangement; that the only person who should be consulted with reference to plaintiff's fees was Mr. West and that the Stevens Hotel company should, under no circumstances, be considered in the matter; that the question of fees was solely between plaintiff and West & Eckhart.

There then followed numerous letters back and forth in which plaintiff insisted that his agreement with West & Eckhart was that their fee would be \$150,000, of which his share was \$75,000. The letters from West & Eckhart repeatedly stated that plaintiff's fee was not a matter of discussion with the defendant but was solely a matter between him and West & Eckhart. At one time plaintiff addressed a letter to Mr. E. J. Stevens, president of the Stevens Hotel company, stating he would appreciate it if Mr. Stevens would arrange to pay his fee. West & Eckhart wrote to the effect that the amount named in plaintiff's bill was much in excess of the total fee which they would charge their client for both their fee and plaintiff's, and offered to confer with plaintiff for the purpose of agreeing upon a reasonable fee. Martin wrote plaintiff, protesting against plaintiff writing to Mr. Stevens and restating that if plaintiff was retained in the case it was by West & Eckhart and that he should look to them for his compensation. In some of the many subsequent letters plaintiff stated that he had in his possession certain records showing the valuation of the finished building and intimated that this material would be used in a way harmful to defendant unless his bill of \$75,000 was paid.

Whether the plaintiff could be held a defendant's office and
 presented to himself a bill for his services, plaintiff made out
 to West & Roberts, but alleged that the same was given him for
 retention only. The bill was for "rental and legal services"
 \$10,000. The bill was in no way acknowledged by West & Roberts
 in a letter at the time. The following day plaintiff wrote
 to plaintiff stating as above in his view of the statement;
 that the only person who could be held liable with reference to
 plaintiff's fees was Dr. J. J. Stevens and never held company
 should, under no circumstances, be considered in the matter; that
 the position of fees was equal between plaintiff and West & Roberts.
 There were various matters between West & Roberts in which
 plaintiff alleged that his services were not rendered. That
 their fee was \$10,000, at which the same was \$10,000. The
 letter from West & Roberts was received by plaintiff's
 fee was not a matter of consideration with the defendant but was
 solely a matter between him and West & Roberts. At one time plaintiff
 did attend a dinner at Dr. J. J. Stevens, president of the
 Stevens Hotel company, during the same occasion it is Dr. Stevens
 would arrange to pay the fee. West & Roberts wrote to the effect
 that the money owed to plaintiff's bill was paid in excess of the
 total fee which they would receive their bill for both cash fee
 and plaintiff's, and offered to transfer with plaintiff for the pur-
 pose of receiving upon a reasonable fee. West wrote plaintiff,
 plaintiff advised plaintiff writing to Dr. Stevens and requesting
 that if plaintiff was retained in any way by West & Roberts
 and that he should look to them for his compensation. In some of
 the many subsequent letters plaintiff stated that he had in his
 possession certain papers showing the valuation of the thing
 plaintiff had indicated that this material would be used in a way
 harmful to defendant unless the bill of \$10,000 was paid.

After giving consideration to the testimony as above outlined and the large number of details which we have not given, the majority of the court is of the opinion that plaintiff failed sufficiently to prove his version of the contract. Not only is he directly contradicted by Martin and Hassell, but the circumstances indicate that such a contract would be unreasonable and improbable. When plaintiff first called on Martin the latter had never heard of him and neither had plaintiff heard of Martin; he was a young man, most of whose experience had been in the trial of criminal cases. Martin knew that West & Eckhart had handled the tax matters for Mr. Stevens for the preceding 12 years. It is unbelievable that Martin would employ plaintiff on the basis of a possible fee of over \$60,000 merely upon plaintiff's solicitation and representations. It is more reasonable to believe that Martin referred plaintiff to West & Eckhart and was willing to abide by their judgment as to whether plaintiff's services might be of value. The weight of the evidence tends to show that West & Eckhart employed the plaintiff upon terms which are in dispute.

We are also of the opinion that even if plaintiff's testimony that he was employed by Martin on behalf of defendant should be believed, Martin had no authority to do this. He was not an officer of defendant and was not employed on a general retainer. He was employed by defendant from time to time on special matters. Most of his practice was connected with insurance companies. He was especially employed by the defendant to assist West & Eckhart with reference to the 1927 taxes on the Stevens hotel. It is undoubtedly true, as argued by plaintiff's counsel, that the scope of an agent's authority may be established by circumstantial evidence, and that one openly and notoriously exercising the functions of an agent for a principal will be presumed to have authority of

That giving consideration to the testimony as above set-
lined and the large number of details which we have not given,
the majority of the court is of the opinion that plaintiff failed
sufficiently to prove his version of the contract. But even if
he directly contradicted by words and actions, but the circum-
stances indicate that such a contract could be made and the
testimony. From plaintiff's first action in March the latter had
never heard of him and believed that plaintiff would not return; he
was a year and a half in prison and plaintiff would not return in the trial
of criminal cases. Plaintiff knew that if he returned he would be
the tax collector for the city of New York for the next 15 years. It
is undoubtedly true that plaintiff would have been plaintiff in the hands
of a possible loss of over \$100,000 which would have been plaintiff's action
action and representation. It is true that plaintiff is believed
that plaintiff refused plaintiff to take a contract and was willing
to make by their judgment as to whether plaintiff's version
might be of value. For value of the evidence tends to show that
that a contract was made with plaintiff from which he is dis-
posed.

It is also of the opinion that even if plaintiff's testi-
mony that he was employed by plaintiff in March of defendant's action
be believed, plaintiff had no authority to do this. He was not an
officer of defendant and was not employed on a permanent basis.
He was employed by defendant from time to time on special matters.
None of his actions was connected with defendant's business. He
was especially employed by the defendant to assist with a contract
with reference to the 1937 taxes on the New York hotel. It is
undoubtedly true, as argued by plaintiff's counsel, that the words
of an agent's authority may be established by circumstantial evi-
dence, and that was equally and necessarily established the conditions
of no agent for a principal will be required to have authority of

such principal so to act. In the instant case, however, Martin was limited in his authority to giving assistance to West & Eckhart in the particular ^{tax}/matters involved. There is no suggestion in the evidence that he had any authority to employ other counsel. It is a matter of frequent occurrence for attorneys to employ assistant counsel who are especially qualified to handle a particular kind of litigation, but such employment is the employment by the attorney first engaged and not by his client, unless his client authorizes such employment or assents to the same. Here, there is no evidence that the defendant company either authorized or assented to the employment of plaintiff, or, indeed, knew of his employment until after the transaction was completed.

In Chicago & Southern Traction Co. v. Flaherty, 222 Ill. 67, it was held that "an attorney employed by a party to a suit has no implied authority to employ an assistant attorney at the expense of his client." In Continental Adjustment Co. v. Hoffman, 123 Ill. App. 69, it was held, with reference to employment of an associate attorney, that "an attorney employed for the transaction of certain legal business does not obtain from such mere employment authority from his client to employ at his pleasure other counsel either as principal counsel in his stead or as his assistant in the business entrusted to him, and thereby impose upon his client the obligation to pay such other counsel." To the same effect is Brothers v. Higgins, 316 Ill. App. 629; also Kvana v. Mohr, 153 Ill. 561; and in Price v. Hay et al., 132 Ill. 343, it was held that proof that the client knew of the assistant attorney's services was not sufficient to bind him. We held that the evidence fails to show that Martin had any authority to employ plaintiff and that there were no facts which would impose liability for such alleged employment upon the defendant.

Even if we were in accord with plaintiff's version of the facts he could not recover under the alleged contract for the reason that it is champertous and non-enforceable. Plaintiff's testimony is that he was to pay for witnesses and "anything I hire" even if he recovered nothing. In Gear v. Frank, 179 Ill. 570, it was held that a champertous contract was one where a person having no interest in the subject matter of a suit becomes interested in it and concerned in its prosecution and makes an agreement to bear the expense and costs of litigation, and that such a contract will not be enforced. To the same effect are Riesman v. Morrison, 264 Ill. 279; Brush v. City of Carbondale, 229 Ill. 144; Phillips v. South Park Commissioners et al., 119 Ill. 626; Torrence v. Shedd, 112 Ill. 466; Coleman v. Billings et al., 89 Ill. 183; Thompson v. Reynolds, 73 Ill. 11. We are not criticising an agreement made by an attorney for contingent fees of a legitimate character. Such contracts have been approved many times. In the instant case, however, we have all the elements which the Supreme court in the case of Gear v. Frank, *supra*, has declared to be a champertous contract. The trial court correctly instructed the jury to this effect, (defendant's given instruction No. 10) and the verdict was rendered upon the theory that the contract was non-enforceable and upon ^{the} quantum meruit.

Plaintiff, however, argues that even if the contract is champertous, one party cannot take the benefit of the services rendered in his behalf and avoid paying what they are reasonably worth, citing Brush v. City of Carbondale, 229 Ill. 144; Nathan v. Peterach, 177 Ill. App. 104. These cases so hold. Plaintiff produced as witnesses two attorneys at law practicing in Chicago, who testified touching the customary legal fees in this class of cases. They were asked the general question as to whether there was any customary fee "in the trying and handling of these tax matters in the county court." They testified that the customary

fee was one-third of the saving.

Recovery upon a quantum meruit must be based upon a contract of employment, either express or implied. If the defendant company, as we have seen, did not request plaintiff to render services for it, or knowingly permit him to perform such services, plaintiff can not recover upon a quantum meruit from the defendant. One party cannot impose liability upon another without the latter's knowledge or consent.

Furthermore, there was nothing presented to the two witnesses upon which they could base an opinion as to the value of the services rendered in this case. The question did not include any description of the services rendered or the time spent or appearances in court and made no reference whatever to the participation therein by West & Eckhart. Again, testimony as to the customary fee for such services is not testimony of what the services are reasonably worth. An agreement for a contingent fee is an agreement to accept an interest in the litigation. In such a case the attorney runs the risk that he will receive nothing for his services. Quite obviously, what would be customary under such circumstances is not the same as the amount for which he would be willing to perform services without assuming the risk of not being paid. What services are reasonably worth contemplates payment for services rendered, which may be increased if the case is a desperate one. As supporting this view is Gilbert v. Fay, 4 D. C. Appeal Cases, 38, where it was held that under the pleading the only grounds of recovery were, first, a contingent contract, and, second, quantum meruit. The court said that if the jury should believe that there was no contract but that plaintiff rendered valuable services, with defendant's knowledge or consent, then plaintiff's right to recover was limited to the actual value of his service "without regard to any contingency whatever." See also Shackleford v. Arkansas Baptist

College, 181 Ark. 363. In Packer v. Pentecost, 50 Ill. App. 226, and Swern v. Churchill, 155 Ill. App. 503, judgments for architects' fees were reversed for the reason that the proof that there was a customary fee among architects to charge a certain percentage was not sufficient to sustain a recovery upon the quantum meruit, the court holding that if there had been proof of a long established custom of making charges, acquiesced in and known to the defendant, the parties would have been held to have contracted with reference to the custom. In this event recovery would not have been upon quantum meruit but upon the special contract into which the custom had entered. We hold that there was no competent evidence in the present record sufficient to support the quantum meruit.

Complaint is made of the refusal of the court to give instructions Nos. 1 and 2, requested by defendant. The substance of these instructions was fully covered in other instructions given. Other points are made which we do not deem it necessary to comment upon.

It appears that the jurors made certain computations on the back of one or more instructions. Twelve amounts were set down, ranging from \$63,000 downwards to \$10,000, and the aggregate of these was divided by twelve, which produces approximately the amount of the verdict. Defendant argues that this is a quotient verdict and therefore should be set aside, citing Selamakas v. Victory Ice & Ice Cream Co., 246 Ill. App. 178. By affidavit, on motion for a new trial, the foreman of the jury stated that these amounts were set down to see if a figure could be arrived at upon which the jury might agree. It is unnecessary for us to determine whether or not this is a quotient verdict. We are inclined to believe that the jury, following the instructions of the court as to the non-enforceability of the alleged contract, was attempting to arrive at a figure on which they could agree as to what the

services were reasonably worth. As we have heretofore said, there was no competent evidence as to the reasonable value of the services.

We might suggest that the weight of the evidence indicates that plaintiff was employed as assistant counsel by the attorneys of defendant and he should look to them for his compensation.

For the reasons indicated the judgment is reversed and the cause is remanded.

REVERSED AND REMANDED.

O'Connor, P. J., dissents.

Matchett, J., concurs.

services.

was no significant difference in the mean values of the

services were found to be significantly different from the

to be made in the future. The Commission is not in a position to make any recommendation at this time.

RESEARCH, I. J. COMPANY
COLUMBIA, S. C. 29201

35500

ESTHER DU BRIN,
Appellee,

vs.

CALUMET WET WASH LAUNDRIES,
Incorporated,
Appellant.

58 7
APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

265 I.A. 604³

MR. JUSTICE MASURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff, while walking on the east side of Essex avenue, which runs north and south in Chicago, and starting to cross the intersection at 77th street on the east cross-walk, was struck by a motor truck belonging to defendant which collided with a Pontiac automobile. She brought suit against defendant and had a verdict and judgment for \$15,000. Defendant appeals.

The accident happened at about 7:30 on the morning of October 30, 1929; it was foggy; the streets, paved with asphalt, were wet and slippery. Defendant's laundry truck was going eastward on the south side of 77th street and a witness estimated its speed, when about a block away from Essex avenue, at 35 or 40 miles an hour. As it approached the intersection of 77th street and Essex avenue a north-bound Pontiac sedan driven by Leslie Bautsch on the easterly side of Essex was also approaching the intersection. Bautsch says he first saw the laundry truck approaching from the west as he entered the intersection, his Pontiac then going about 10 or 15 miles an hour; that the truck then was 25 to 50 feet away from him; that the truck did not stop or change its speed. Bautsch says that when he saw there would be a collision he applied his brakes, the laundry truck turned to the northeast, apparently in an attempt to get by the Pontiac but without success, for the Pontiac struck it on the side towards the rear, and the rear end of the truck skidded towards the northeast, making a half circle

STATE OF NEW YORK

IN SENATE

258 I.A. 604

REPORT OF THE
COMMISSIONER OF THE
DEPARTMENT OF
CORRECTIONS
ON THE
CASE OF
THE
STATE OF NEW YORK
IN SENATE
258 I.A. 604

THE JUDICIAL DEPARTMENT DELIVERED THE DECISION OF THE COURT.

Plaintiff, while walking on the east side of Essex Avenue, which runs north and south in Chicago, and starting to cross the intersection of 77th Street on the east crosswalk, was struck by a motor truck belonging to defendant which collided with a Pontiac automobile. The plaintiff was against defendant and had a verdict and judgment for \$10,000. Defendant appeals.

The accident happened at about 7:30 on the morning of October 30, 1938; it was foggy; the streets, paved with asphalt, were wet and slippery. Defendant's laundry truck was being eastward on the south side of 77th Street and a witness estimated its speed, when about a block away from Essex Avenue, at 35 or 40 miles an hour. As it approached the intersection of 77th Street and Essex Avenue a north-bound Pontiac sedan driven by Leslie Bantach on the east side of Essex was also approaching the intersection. Bantach says he first saw the laundry truck approaching from the west as he entered the intersection, his Pontiac then being about 10 or 15 miles an hour; that the truck then was 25 to 30 feet away from him; that the truck did not stop or change its speed. Bantach says that when he saw there would be a collision he applied his brakes, the laundry truck turned to the northeast, apparently in an attempt to get by the Pontiac but without success, for the Pontiac struck it on the side towards the rear, and the rear end of the truck slid towards the northeast, making a half circle

until it headed to the west, when it skidded or ran backwards for a distance of 75 feet on 77th street and stopped with its right hand wheels over the north curb of 77th street. Plaintiff was just about to cross 77th street on the east crosswalk of Essex avenue and was approximately 8 feet or less south of the north curb of 77th street when the collision occurred. As the rear end of the laundry truck described a half circle and skidded towards the east it struck plaintiff, throwing her a distance of over 20 feet eastward in 77th street.

Defendant argues that plaintiff was guilty of contributory negligence as a matter of law in stepping into 77th street while defendant's truck was approaching from the west. The truck was running on the south side of 77th street, and if the collision with the Pontiac had not occurred it would have continued eastward on the south side of the street, well out of the way of the possibility of striking plaintiff who was at the time near the north curb. The jury could properly find that plaintiff had no reason to anticipate a collision between the two cars and that she had the right to assume that the car which should have yielded the right of way to the other would do so, and that there would be no accident. Before a plaintiff can recover in a case of this kind, due care for his own safety must be exercised; but in the instant case due care on the part of plaintiff did not mean that she should so conduct herself as to escape one of the colliding automobiles, especially where the truck which struck her skidded in an unexpected way. Pedestrians cannot be expected to guard against unexpected and unusual accidents from colliding automobiles. Not infrequently pedestrians in walking in supposed safety on the sidewalk have been severely injured and sometimes killed in just such accidents as this. A witness, Mr. Fowler, who was at the time on 77th street about 75 feet east from

until it reached to the west, when it widened or ran backward for a distance of 75 feet on 77th street and stopped with its right hand wheels over the north curb of 77th street. Plaintiff was just about to cross 77th street on the east crosswalk of West Avenue and was approximately 8 feet or less south of the north curb of 77th street when the collision occurred. At the rear end of the laundry truck described a half block and a half towards the east it struck plaintiff, throwing her a distance of over 20 feet eastward in 77th street.

Defendant argues that plaintiff was guilty of contributory

negligence as a matter of law in stepping into 77th street while

defendant's truck was approaching from the west. The truck was

turning on the south side of 77th street, and if the collision with

the plaintiff had not occurred it would have continued eastward on the

south side of the street, well out of the way of the possibility of

striking plaintiff who was at the time near the north curb. The

jury could properly find that plaintiff had no reason to anticipate

a collision between the two cars and that she had the right to as-

sume that the car which should have yielded the right of way to the

other would do so, and that there would be no accident. Before a

plaintiff can recover in a case of this kind, she must for her own

safety not be excluded; but in the instant case due care on the

part of plaintiff did not mean that she should so conduct herself as

to escape one of the colliding automobiles, especially where the

truck which struck her collided in an unexpected way. Pedestrians

cannot be expected to guard against unexpected and unusual accidents

from colliding automobiles. Not infrequently pedestrians in waiting

in supposed safety on the sidewalk have been severely injured and

sometimes killed in such well accidents as this. A witness, Mr.

Reyer, who was at the time on 77th street about 75 feet west from

Essex, testified that he "had to jump out of the way. I thought he was coming back to hit me." Whether plaintiff exercised due care was a question of fact to be determined by the jury, and its conclusion in this respect was justified by the evidence.

The jury could properly find that the accident happened through the negligence of the driver of defendant's truck. At the southwest corner of the intersection the buildings are set back about 30 feet from the curb. As defendant's truck approached Essex, the driver by looking southward to his right could have seen the north-bound Pontiac automobile in ample time to have avoided the collision. Under the statute governing the movements of vehicles approaching street intersections (section 34, chapter 95a, Cahill) it was the driver's duty to yield the right of way to the Pontiac approaching the intersection on his right. The driver says he knew this. He was therefore bound to be on the lookout for any such vehicle. He gave the almost unbelievable testimony that he did look south on Essex and saw no automobile at any place, that there were no cars in the block; that he did not see the Pontiac car until after the collision. As the Pontiac car was then in fact approaching on Essex - and about this there is no dispute - the jury could have disregarded the version of the driver of defendant's truck and could properly believe that he was paying no attention to the possibility of any other vehicle approaching the intersection from his right, but was proceeding at a good rate of speed, regardless of consequences. We cannot say that the findings of the jury in this respect are against the weight of the evidence.

It was proper to admit the testimony of the witness Fowler, who says that he saw the defendant's truck when it was a block away, and later a half block away from the scene of the accident; that it was then proceeding at a speed of 35 to 40 miles an hour. This had a bearing on the rate of speed the truck was going at the time

Hezek, testified that he "went to town out of the way. I don't know
 was of the fact to him." That or possibly explained the case
 was a question of fact to be determined by the jury, and the con-
 sideration in this matter was testified by the evidence.

The jury could properly find that the accident happened

through the negligence of the driver of defendant's truck. At

the southwest corner of the intersection the buildings are set back
 about 30 feet from the curb. As defendant's truck approached Hezek,

the river by looking southward so his right could have seen the

north-bound Pontiac while in a pipe time to have avoided the

collision. Under the statute governing the movement of vehicles

approaching street intersections (section 24, chapter 23A, G.S. 1911)

it was the driver's duty to yield the right of way to the Pontiac

approaching the intersection on his right. The driver says he knew

this. He was therefore bound to do so on the lookout for any such

vehicle. He gave the almost unbelievable testimony that he did look

across the road and saw no automobile at any place, that there were

no cars in the block; that he did not see the Pontiac car until after

the collision. As the Pontiac car was then in fact approaching on

Hezek - and about that time there is no dispute - the jury could have dis-

regarded the version of the driver of defendant's truck and could

properly believe that he was paying no attention to the possibility

of any other vehicle approaching the intersection on the right, but

was proceeding at a good rate of speed, regardless of consequences.

We cannot say that the findings of the jury in this respect are

against the weight of the evidence.

It was proper to admit the testimony of the witness Fowler,

who says that he saw the defendant's truck when it was a block away,

and later a half block away from the scene of the accident; that

it was then proceeding at a speed of 35 to 40 miles an hour. This

had a bearing on the rate of speed the truck was going at the time

it entered the street intersection, which, its driver said, was 10 miles an hour. The jury could reasonably infer not only from this evidence but from the fact that after the collision the truck skidded backwards for a distance of 75 feet, that it was traveling at a fast rate of speed.

The instruction with reference to due care on the part of plaintiff was proper in that it referred to her position both "before and at the time of the occurrence in question."

Criticism is made of the medical testimony introduced on behalf of the plaintiff. We cannot say that reversible errors occurred in this respect, but we are inclined to think that by the over-stressing of the possible injuries to the brain, in view of other facts hereinafter stated, the jury did not receive a correct picture of the physical and mental condition of plaintiff. Particularly was the testimony of Dr. Krumholz, testifying as an expert, calculated to lead the jury to believe that because of the injuries received in the accident plaintiff was mentally affected. Plaintiff's testimony tended to emphasize this by her evident forgetfulness and her confused answers to questions. To illustrate, she said that she had no recollection as to what happened on the morning of the accident from the time she left her home; that she saw no automobiles on this morning. She does not remember where she suffered pain. In answer to the question, "How do you feel now?" she answered, "All right." Question: "Do you feel any pains anywhere?" Answer: "No, sir." This she repeated. Finally, after much questioning it was elucidated from her that she suffered pain "once in a while" in her legs. In answer to the question, "How does your head feel?" she answered, "All right."

Plaintiff had received severe injuries. Immediately after the accident she was taken to a hospital and was unconscious for several days. There was evidence of brain irritation and two

it entered the street intersection, which, the driver said, was 10 miles an hour. The jury could reasonably infer not only from this evidence but from the fact that after the collision the truck skidded backward for a distance of 75 feet, that it was traveling at a fast rate of speed.

The instruction with reference to the care on the part of plaintiff was proper in that it referred to her position "before and at the time of the occurrence in question."

Plaintiff is made of the medical testimony introduced on behalf of the plaintiff. We cannot say that reversible errors occurred in this respect, but we are inclined to think that by the over-stressing of the possible injuries to the brain, in view of other facts mentioned, the jury did not receive a correct picture of the physical and mental condition of plaintiff. Part-

tionally was the testimony of Dr. Brumfield, testifying as an expert, calculated to lead the jury to believe that because of the injuries received in the accident plaintiff was mentally affected. Plaintiff's testimony tended to emphasize this by her evident nervousness and her confused answers to questions. To illustrate, she said that she had no recollection as to what happened on the morning of the accident from the time she left her home; that she saw no auto either on this morning. She does not remember where she suffered pain. In answer to the question, "How do you feel now?" she answered, "All right." Question: "Do you feel any pains anywhere?" Answer: "No, sir." This she repeated. Finally, after such questioning it was suggested from her that she suffered pain "once in a while" in her legs. In answer to the question, "How does your head feel?" she answered, "All right."

Plaintiff had received severe injuries. Immediately after the accident she was taken to a hospital and was unconscious for several days. There was evidence of brain irritation and two

spinal punctures were made to relieve cerebro-spinal pressure and there were traces of blood in the spinal fluid, indicating brain injuries. A lower edge of the ischium of the pelvis was fractured; there was a fracture of five ribs on the right side. She made a fairly good recovery, and at the time of the trial she did the same kind of work she had done before the accident. She had lived in New York City before coming to Chicago; when she was ^{about} eighteen she left New York and came to live with her married sister in Chicago, where she has been living for the last twenty-five years. She does not remember the name of the boarding school which she attended in New York. After the accident she walks just about the same as she did before, going to moving picture shows and to the store to buy things; she has no money of her own and never had any, and has never been employed at any time during her life; her brother-in-law gave her money to go to movie shows both before and after the accident. Her sister keeps a maid although plaintiff both before and after the accident assisted in making beds and washing dishes.

Mrs. Byrnes, a neighbor, lived in the same building where plaintiff lived for five years, saw her frequently, and has also seen her since plaintiff moved from that building. She testified that plaintiff's general demeanor was just about the same after the accident as it was before; she says that plaintiff "always acted ^a little funny." She was always talking to herself or would talk to little children. In the opinion of the witness plaintiff's mental condition was practically the same after the accident as it was before and her conduct was the same. The witness stated that plaintiff's conduct indicated to the witness that she "was not just right" just before and after the accident. On motion, this statement was stricken. While the evidence of this witness is not conclusive, yet, coupled with the other facts connected with plaintiff it leaves a very

spinal punctures were made to relieve cerebro-spinal pressure and there were traces of blood in the spinal fluid, indicating brain injury. A lower edge of the incision of the pelvis was fractured. There was a fracture of five ribs on the right side. She was a fairly good recovery, but at the time of the trial she did the same kind of work she had done before the accident. She had lived in New York City before coming to Chicago; when she was ^{about} eighteen she left New York and came to live with her mother in Chicago, where she has been living for the last twenty-five years. She does not remember the name of the boarding school which she attended in New York. After the accident she went just about the same as she did before, going to evening classes above and to the store to buy things; she has no memory of her own and never had any, and has never been employed at any time during her life; her brother-in-law gave her money to go to make shoes both before and after the accident. Her sister keeps a maid whose name is Elizabeth both before and after the accident assisted in making beds and washing dishes. Mrs. Lyman, a neighbor, lived in the same building when Elizabeth lived for five years; saw her frequently, and has also seen her since Elizabeth moved from that building. She testified that Elizabeth's general demeanor was just about the same after the accident as it was before; she says that Elizabeth "always acted funny." She was always talking to herself or would talk to little children. In the opinion of the witness Elizabeth's mental condition was practically the same after the accident as it was before and her conduct was the same. The witness stated that Elizabeth's conduct indicated to the jury that she "was not just right" just before and after the accident. On motion, this statement was stricken. While the evidence of this witness is not conclusive, yet, coupled with the other facts connected with Elizabeth it leaves a very

definite impression that plaintiff had been mentally sub-normal before the accident and that this condition was not substantially changed because of any injuries received in the accident.

The jury awarded plaintiff \$15,000, and while we cannot say that this was the result of prejudice and passion on the part of the jury, necessitating a reversal, and while we hesitate to set up our judgment against that of the jury as to the extent of plaintiff's injuries, yet, for the reasons above indicated we are of the opinion that the jury failed to appreciate all of the circumstances relating to the plaintiff's physical and mental condition. In our opinion the verdict should be reduced to \$10,000. If, therefore, plaintiff within ten days from the date of filing this opinion will remit \$5000 from the judgment, it will be affirmed for \$10,000; otherwise it will be reversed and the cause remanded.

AFFIRMED UPON REMITTITUR; OTHERWISE
REVERSED AND REMANDED.

O'Connor, P. J., and Matchett, J., concur.

definite expression that plaintiff had been mentally and morally before the accident and that this condition was not substantially changed because of any injuries received in the accident.

The jury awarded plaintiff \$10,000, and while we cannot say that this was the result of prejudice and passion on the part of the jury, necessitating a reversal, and while we hesitate to set up our judgment against that of the jury as to the extent of plaintiff's injuries, yet, for the reasons above indicated we are of the opinion that the jury failed to appreciate all of the circumstances relating to the plaintiff's physical and mental condition. In our opinion the verdict should be reduced to \$10,000. If, therefore, plaintiff within ten days from the date of filing this opinion will remit \$5000 from the judgment, it will be affirmed for \$10,000; otherwise it will be reversed and the case remanded.

APPROVED UPON REHEARING; OTHERWISE
REVERSED AND REMANDED.

O'Connor, J., and Macdonald, J., concur.

35657

CATHERINE KESSEN,
Appellee,

v.

WILLIAM SOENKSEN,
Appellant.

59
APPEAL FROM CIRCUIT
COURT, COOK COUNTY.

265 I.A. 604⁴

MR. JUSTICE MESURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff, while riding in an automobile going north on Wentworth avenue, Chicago, received injuries through a collision with defendant's automobile going eastward on 115th street. Plaintiff brought suit and had a verdict and judgment for \$2000. Defendant appeals.

The accident happened about five o'clock on the evening of November 24, 1930. Wentworth avenue runs north and south and is established by city ordinance as a through street; 115th street intersects it, running east and west; on 115th street and about 60 feet west of the intersection at Wentworth is a sign reading "Through Street - Stop."

Plaintiff was riding in the back seat of her automobile driven by her daughter, going north on the east side of Wentworth avenue. Considering the slightly varying testimony, the jury could properly believe that as they approached 115th street their car slowed to less than 20 miles an hour because of a "caution sign" on Wentworth. At the same time, defendant's car was coming eastward on 115th street and passed the "stop" sign west of Wentworth without stopping, running, as one witness said, 35 to 50 miles an hour. Both cars approached the intersection at nearly the same time. Plaintiff's daughter looked to the west and saw

CATHARINE KERNER,
Appellee,

v.

WILLIAM KERNER,
Appellant.

APPEAL FROM CIRCUIT
COURT, COOK COUNTY.

265 I.A. 604

MR. JUSTICE McGRATH DELIVERED THE OPINION OF THE COURT.

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on Wentworth avenue, Chicago, received injuries through a
collision with defendant's automobile going westward on 115th
street. Plaintiff brought suit and had a verdict and judgment
for \$2000. Defendant appeals.

The accident happened about five o'clock on the evening
of November 24, 1935. Wentworth avenue runs north and south and
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intersects it, running east and west; on 115th street and about
60 feet west of the intersection at Wentworth is a sign reading
"Through Street - Stop".

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car slowed to less than 20 miles an hour because of a "caution
sign" on Wentworth. At the same time, defendant's car was coming
eastward on 115th street and passed the "stop" sign west of
Wentworth without stopping, turning, as one witness said, 35 to
50 miles an hour. Both cars approached the intersection at nearly
the same time. Plaintiff's daughter looked to the west and saw

defendant's car and proceeded to cross, when defendant's car, coming on, struck the left rear part of plaintiff's car, inflicting the injuries to plaintiff for which she brings this suit. Defendant not only disregarded the stop sign before attempting to cross Wentworth avenue, but also violated the statute which gave the right of way to plaintiff's car. Section 33, chapter 93a, Illinois Statutes (Cahill). The finding of the jury that the accident was caused by the negligence of the defendant is not questioned in this court.

Defendant first argues that plaintiff did not prove that she was free from contributory negligence. She was about 66 years of age at the time of the accident; she was familiar with the streets at this point and was watching the traffic at the time. As plaintiff's car proceeded to cross the street intersection and defendant's car had reached the curb line on the west side of Wentworth avenue, plaintiff had a right to assume that defendant would yield the right of way to plaintiff's car. Plaintiff had a right also to assume that as she and her daughter were driving on a through street that defendant would observe the stop sign before entering Wentworth avenue. It is difficult to determine what plaintiff should have done to prevent the accident. The question of her contributory negligence was properly submitted to the jury and we cannot say that its conclusion in this respect is against the weight of the evidence.

Complaint is made of the cross-examination by plaintiff's counsel of one of defendant's witnesses, Frank Trott, who was riding with defendant at the time of the accident. It is said that under this cross-examination it developed that defendant had had three other collisions with his automobile that afternoon shortly

Defendant's car was proceeding to cross, when defendant's car, coming from the left, part of plaintiff's car, including the portion of plaintiff's car which was within the width of the highway, was also proceeding to cross. Defendant not only attempted to cross when plaintiff was attempting to cross, but also violated the statute which gave the right of way to plaintiff's car. Section 33, Chapter 18A, Illinois Statutes (Cecil). The finding of the jury that the accident was caused by the negligence of the defendant is not sustained in this regard.

Defendant first argues that plaintiff did not prove that she was then contributorily negligent. She was about 66 years of age at the time of the accident; she was familiar with the streets at this point and was walking the traffic of the road. As plaintiff's car proceeded to cross the street intersection and defendant's car was beyond the curb line on the west side of Jackson Avenue, plaintiff had a right to assume that defendant would yield the right of way to plaintiff's car. Plaintiff was a right of way to assume that an oncoming car would be driving on a through street and defendant with objective and clear sight before entering the street. It is difficult to determine what plaintiff did and how she was to prevent the accident. The question of her contributory negligence was properly submitted to the jury and we cannot say that its submission in this regard is against the weight of the evidence.

Complaint is made by the cross-examination of plaintiff's account of one of defendant's witnesses, Frank Little, who was riding with defendant at the time of the accident. It is said that under this cross-examination it appeared that defendant had had three other collisions with the automobile that afternoon shortly

before the present accident and cases are cited holding it error to permit evidence of other accidents. These cases are not applicable here. Trott had testified that after the collision with plaintiff's automobile the bumper on defendant's car was pushed out of place several inches and the frame bent. This tended to corroborate defendant's testimony that plaintiff's car had struck his front bumper in an attempt to pass defendant's car. To combat this, plaintiff's counsel developed the previous collisions shortly before with other vehicles in which defendant's bumper was pushed out of place. This was proper cross-examination.

Furthermore, defendant testified in chief as to these previous collisions. Defendant having thus opened the door as to these occurrences, it was proper for plaintiff's counsel to cross-examine as to how far defendant's bumper was damaged in these previous collisions. We find no error in this.

It is claimed the court erred in giving plaintiff's instruction No. 1, which in substance told the jury that plaintiff must "prove her case as alleged in her declaration" by a preponderance of the evidence. This was criticised on the ground that there was no instruction given defining the issues in the case. The instruction may be objectionable, but defendant cannot complain because he himself offered instructions, which were given, which merely referred the jury to the allegations in the declaration. This is particularly true of defendant's given instructions 12, 13 and 18. Lerette v. Director General, 306 Ill. 348; City of Geneseo v. Schultz, 257 Ill. 273. The same considerations are applicable to plaintiff's given instruction No. 2.

Plaintiff's given instruction No. 3 is criticised as authorizing the jury, in determining the amount of damages, to take into consideration, among other things, the future suffering

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to permit evidence of other accidents. These cases are not

applicable here. Trost has testified that after the collision

with plaintiff's automobile the bumper on defendant's car was

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examine as to how defendant's bumper was damaged in these previous

collisions. To find no error in this.

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Instruction No. 1, which in substance said the jury that plaintiff

must "prove her case as alleged in her declaration" by a preponder-

ance of the evidence. This was objected on the ground that

there was no instruction given defining the issue in the case.

The instruction may be objectionable, but defendant cannot complain

because he himself offered instructions, which were given, which

expressly referred the jury to the allegations in the declaration.

This is particularly true of defendant's given instruction 12,

13 and 14. Levitt v. District General, 306 Ill. 448; 217 Ill.

444; 1927 Ill. 473. The same considerations are

applicable to plaintiff's given instruction No. 2.

Plaintiff's given instruction No. 3 is criticized as

authorizing the jury, in determining the amount of damages, to

take into consideration, among other things, the future earning

and loss of health. It is contended there is no evidence as to these elements.

Plaintiff lived with her daughter in a five room house prior to the accident and did the housework, including the washing and sweeping; after the accident she was confined to bed for about five weeks; her daughter, a practical nurse, took care of her; she suffered pain in her head, neck, shoulder and arm; her collar bone was broken and was set by the family physician; she was unable to do any housework for four months; at the time of the trial, which was nearly a year after the accident, her arm was painful when she stretched it out; she could lift it to a certain point but if she moved it past that point she suffered pain; a physician testified he had examined plaintiff's arm a few days before the trial and found a limitation of motion in the shoulder joint; plaintiff testified that a few weeks before the trial the arm and hand became swollen and then the swelling subsided.

We think this was evidence from which the jury could properly infer that there would be future pain and suffering, with loss of health. The instruction limits the consideration of the jury to such suffering and loss of health, "if any." In L. E. & M. S. Ry. Co. v. Johnson, 135 Ill. 641, the giving of a similar instruction was held not to be reversible error, on the ground that the evidence as to plaintiff's physical condition at the time of the trial was sufficient to justify the giving of the instruction.

It is said that the verdict is excessive. The amount awarded was fully justified by the injuries received and cannot be held to be excessive.

The verdict was supported by the evidence and, as there were no errors upon the trial, the judgment is affirmed.
O'Connor, P. J., and Matchett, J., concur.

AFFIRMED.

35695

EDA MESIROW,
Appellee.

vs.

MAURICE ELIAS MESIROW,
Appellant.

60
7
APPEAL FROM CIRCUIT COURT
OF COOL COUNTY.

265 I.A. 604⁵

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

This is an appeal from an order holding defendant in contempt and ordering him committed to jail until he complies with the decree of the court respecting alimony.

The complainant, Eda Mesirov, filed her bill seeking divorce, charging the defendant with desertion. December 28, 1928, a decree was entered which incorporated a property settlement made between the parties. This agreement, which was set out at length in the decree, provided, among other things, that defendant was to pay the sum of \$45 a week to complainant as alimony. Defendant afterwards applied to the court for a modification of the decree, which was resisted by complainant who filed a petition showing that respondent was \$675 in arrears on the solicitor's fee and \$435 on the alimony, and asking that he be required to show cause why he should not be punished for contempt. He withdrew his petition asking for modification of the decree and answered the rule, asserting in substance that he was willing to pay such amount as was equitable and that his earnings had very materially been diminished since the entry of the decree. Evidence was heard by the chancellor who adjudged respondent to be in contempt.

Respondent appealed to the Supreme court, assigning as error that the decree is contrary to section 12 of article 2 of the Constitution, which provides that no person shall be imprisoned for debt unless upon refusal to deliver up his estate for the

MAURICE ALIAS EMBROIDER

Appellant

vs.

MAURICE ALIAS EMBROIDER
Appellee

IN THE CIRCUIT COURT

OF THE COUNTY

2565 I.A. 604

THE JUDGE HEREBY DELIVERED HIS DECISION IN THE COURT.

This is an appeal from an order holding defendant in

contempt and ordering him to pay the costs of the

with the decree of the court respecting alimony.

The complaint, E.A. Embroider, filed her bill seeking al-

imony, charging the defendant with desertion. December 26, 1933,

a decree was entered which instructed a property settlement made

between the parties. This agreement, which was set out at length

in the decree, provided, among other things, that defendant was to

pay the sum of \$45 a week to plaintiff as alimony. Defendant

afterwards applied to the court for a modification of the decree,

which was resisted by plaintiff who filed a petition showing that

respondent was \$600 in arrears on the solicitor's fee and \$435 on

the alimony, and asking that he be required to show cause why he

should not be punished for contempt. He withdrew his petition ask-

ing for modification of the decree and answered the role, asserting

in substance that he was willing to pay such amount as was equitable

and that his earnings had very materially been diminished since the

entry of the decree. Evidence was heard by the court and a de-

creed respondent to be in contempt.

Respondent applied to the supreme court, assigning

as error that the decree is contrary to section 12 of article 2 of

the constitution, which provides that no person shall be imprisoned

for debt unless he has refused to deliver up his estate for the

benefit of creditors, or in cases where there is a strong presumption of fraud. The Supreme court held that the imprisonment for failure to pay alimony is not an imprisonment for debt in which he could claim exemption under the Constitution. The cause was therefore transferred to this court. 346 Ill. 219.

The complainant testified that she had earned a small income since the decree was entered; that she was employed intermittently, and that her entire income for four years was a little over \$1400; that she has been ill and was at the time of the hearing under the care of a physician; that she has no other source of income except the alimony provided for in the decree. Defendant testified that he was engaged in the practice of medicine in Chicago; that prior to the divorce his income was about \$500 a month; that in 1929, the year following the divorce, his income was approximately \$2400 gross, or approximately \$1600 net; that during the year 1930, up to the time of the hearing, his income was slightly over \$700; that he had borrowed certain sums of money; that he was remarried and his present wife was employed as a singer for the Chicago Civic Opera Company; that she pays for the house rent and all other household expenses; that he did not know what her salary was. He is a specialist in the treatment of the eye but devotes only about three and one-half hours a day in his office; keeps no accounts and keeps no duplicates of bills sent to patients; all records of cases are kept by him on what are called history cards; he maintains no bank account and has had no bank account since the decree of divorce was entered. He says he borrowed \$1500 of one party since 1929 and \$300 from another, yet kept no memorandum of this and has kept no notes of the same and has no record as to when, where, or under what circumstances he borrowed these amounts. He also says he is indebted to his present wife in the sum of \$1500, with no memorandum or record concerning

benefit of creditors, or in cases where there is a strong presumption of fraud. The Supreme Court held that the imprisonment for failure to pay alimony is not an imprisonment for debt in which he could claim exemption under the Constitution. The cause was therefore transferred to this court. 300 Ill. 419.

The complainant testified that she had earned a small income since the divorce was entered; that she was employed intermittently, and that her net income for four years was a little over \$1400; that she has been ill and was at the time of the hearing under the care of a physician; that she has no other source of income except the alimony provided for in the decree. Defendant testified that he was engaged in the practice of medicine in Chicago; that prior to the divorce his income was about \$200 a month; that in 1929, the year following the divorce, his income was approximately \$240 gross, or approximately \$180 net; that during the year 1930, up to the time of the hearing, his income was slightly over \$200; that he had borrowed certain sums of money;

that he was married and his present wife was employed as a stenographer for the Chicago Civic Opera Company; that she pays for the house rent and all other household expenses; that he did not know what her salary was. He is a specialist in the treatment of the eye but devotes only about three and one-half hours a day in his office; keeps no accounts and issues no duplicates of bills sent to patients; all records of cases are kept by him on what are called history cards; he maintains no bank account and has no bank account since the divorce was entered. He says he borrowed \$1200 of one party since 1925 and \$200 from another, yet kept no memorandum of this and has kept no notes of the same and has no record as to when, where, or under what circumstances he borrowed these amounts. He also says he is indebted to his present wife in the sum of \$1200, with no memorandum or record concerning

it. An accountant testified as to the total results from the figures appearing upon the history cards furnished him by the respondent.

Considering the fact that prior to the divorce respondent was in receipt of an income approximating \$6000 a year, which after the divorce shrunk to about \$700 a year, the chancellor might properly conclude that if these figures were correct the defendant was not making an earnest effort to earn an income, but his household expenses, including the rent, are borne by his present wife. His lack of books of account, his method of doing business wholly in currency, with no bank account, all might well convince the chancellor that he was purposely so conducting his business as to hinder the payment and collection of alimony. The court might well find that defendant's attempt to purge himself of the contempt charge was not convincing and that he was wilfully refusing to obey the decree of the court. Under such circumstances the chancellor has the power to imprison for contempt, and we cannot say, from the record, that there was error in so ordering. The judgment is therefore affirmed.

AFFIRMED.

O'Connor, P. J., and Matchett, J., concur.

12. An account certified as to the total results from the figures appearing upon the record was furnished him by the respondent.

Denial being the first fact prior to the divorce respondent was in receipt of an income approximately \$3000 a year, which after the divorce amount to about \$700 a year, the chancellor might properly conclude that if these figures were correct the defendant was not making an earnest effort to earn an income, and his household expenses, including the rent, are borne by his present wife. His lack of books or account, his method of doing business wholly is haphazard, with no book account, all right well concludes the chancellor that he was not honestly so conducting his business as to render the payment and collection of money. The court might well find that defendant's attempt to evade himself of the contempt charge was not convincing and that he was wilfully refusing to obey the decree of the court. Under such circumstances the chancellor has the power to imprison for contempt, and we cannot say, from the record, that there was error in so ordering. The judgment is therefore affirmed.

APPROVED.

O'Connor, F. J., and Lathrop, J., concur.

35378

COMMERCIAL LIGHT COMPANY,
a Corporation, Appellee.

vs.

BEN STEVENSON, Appellant.

61 7
APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

265 I.A. 605¹

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This is an appeal by defendant from a judgment in the sum of \$1398.35 entered upon the verdict of a jury returned by direction of the court at the close of all the evidence.

Plaintiff sued as the assignee of Aaron Halperin, who on June 21, 1928, as it was alleged, entered into a contract in writing with defendant whereby Halperin agreed to construct, operate and maintain electric lighting posts in front of premises in which plaintiff was interested at Nos. 7926, 7934, 7936-40, 7942-6, 7952-6 Cottage Grove avenue in Chicago for compensation named in said writing. The claim sued on was for the cost of construction, maintenance and operation of the posts from August 11, 1928, to May 1, 1929. The judgment entered was for the full amount claimed, and there is no controversy as to the amount due, in case plaintiff is entitled to recover at all.

Defendant, however, averred in his affidavit of merits that he had a good defense to the whole demand and that he was not indebted to plaintiff in any amount whatever. He admitted that he signed the writing which was set up in plaintiff's statement of claim, but averred "That it was upon the express agreement made and entered into by and between the plaintiff and the defendant that the signing of said agreement by the defendant was not to be operative or binding upon the defendant and that the transferring of the manual possession of said agreement by the defendant into the

COMMERCIAL AIR COMPANY,
a Corporation,
Appellee,

vs.

LEE STEVENSON,
Appellant.

ALLIED AIRCRAFT MANUFACTURING COMPANY

CHICAGO, ILL.

253 I.A. 605

THE JUSTICE COURT RECEIVED THE OPINION OF THE COURT.

This is an appeal by defendant from a judgment in the sum of \$100.00 entered upon the verdict of a jury returned by dissection of the court at the close of all the evidence.

Plaintiff, who is the assignee of Aaron Kaplan, who on June 21, 1935, as it was alleged, entered into a contract in writing with defendant whereby Kaplan agreed to construct, operate and maintain electric lighting poles in front of premises in which plaintiff was interested at Nos. 7920, 7924, 7926-28, 7942-44, 7922-4 Cottage Grove Avenue in Chicago for compensation named in said writing. The said work was for the cost of construction, maintenance and operation of the poles from August 11, 1932, to May 1, 1934. The judgment entered was for the full amount claimed, and there is no controversy as to the amount due, in case plaintiff is entitled to recovery of said.

Defendant, however, averred in his affidavit of merits that he had a good defense to the whole demand and that he was not indebted to plaintiff in any amount whatever. He admitted that he signed the writing which was set up in plaintiff's statement of claim, but averred "That it was upon the express agreement made and entered into by and between the plaintiff and the defendant that the signing of said statement by the defendant was not to be operative or binding upon the defendant and that the transferring of the manual possession of said statement by the defendant into the

hands of the plaintiff was not to constitute delivery of said agreement." The affidavit of merits alleged that plaintiff agreed to possess itself of the agreement merely for the purpose of exhibiting it to other property owners in the blocks from 79th to 83rd streets on Cottage Grove avenue for the purpose of persuading them to enter into an agreement with plaintiff for the installation and construction of a lighting system to include the entire length on both sides of the street of the four blocks of property from 79th to 83rd streets; that it was agreed that there would be no construction or installation of the lights and no delivery of the agreement signed by defendant unless all of the property owners of the four blocks entered into an agreement with plaintiff for the purpose of installing the lights; that plaintiff failed to secure such agreement from the property owners and failed to perform the things which it had agreed to do for the purpose of effecting a delivery of the agreement of June 21, 1928, from defendant to plaintiff.

The principal alleged error assigned and argued by defendant is that the court excluded evidence offered by defendant to establish this defense. Upon the trial plaintiff called defendant as a witness and proved by him that he had affixed his signature to the writing, upon which plaintiff relies, on or about June 21, 1928; that plaintiff's assignor thereafter erected ornamental street posts and lights on Cottage Grove avenue between 79th and 80th streets; that they were put in good working order and that he had seen them burning; that he saw his property on Cottage Grove avenue between 79th and 80th streets at least once a week and took care of it himself; also that he signed a written statement dated June 21, 1928, which by its terms referred to the alleged contract of the same date, in and by which he agreed to be personally responsible for payments made under the terms of that contract covering a parcel

[illegible]

of land on Cottage Grove avenue held in the name of the Chicago Title & Trust Co. and another parcel held in the name of the West Englewood Trust & Savings Bank. Plaintiff further proved that defendant attached his signature and seal in approval of a written statement of June 30, 1928, which contained an understanding supplemental to this contract. Plaintiff also proved the installation of the lights by the evidence of the secretary of the Commercial Light Co., the assignment of the agreement by Halperin to plaintiff, and the amount of the charges up to May 1, 1929, and rested its case.

Defendant was then called as a witness and in his own behalf testified that in the fall of 1927 he was president of the 79th and Cottage Grove Chamber of Commerce, when he had dealings with plaintiff through Mr. Howard, its agent; that Howard and other business people were present in a meeting hall at the corner of 79th street and Cottage Grove avenue, and that he could name some of them. Whereupon the following took place:

"Mr. Wolf (attorney for plaintiff): I object to the line of questioning. I don't object to the preliminary questions, but we are going into now almost a year before the contract was signed.

Mr. Quilici (attorney for defendant): Just a matter of a few months before the contract was signed.

Mr. Wolf: The fall of 1927.

Mr. Quilici: Or winter of 1928."

It was then suggested by one of the attorneys for plaintiff that the contract spoke for itself, and the court stated that the matter would be considered in chambers. Mr. Quilici for defendant then stated that he wished to offer in evidence the testimony of defendant and of a number of owners of property located between 79th and 83rd streets on Cottage Grove avenue who were members of that Chamber of Commerce; that "the matter discussed in connection with the lights was based on a proposition of installation of four blocks of lights lying in between the streets mentioned, 79th to 83rd street; that at no time was there any discussion pertaining to any installation

of lights for a lesser strip than the four blocks mentioned." Attorney for plaintiff then inquired if the time of the meetings of this Chamber of Commerce had been fixed. Attorney for defendant replied in substance that the meetings were held late in the fall of 1927 and early that winter and also were held throughout the spring of 1928, and continuing his offer, stated that plaintiff submitted estimates and figures; that defendant appointed a committee of the members of the Chamber of Commerce to cooperate with plaintiff for the purpose of securing the signatures of the property owners to contracts for the installation of lights affecting their particular property. Mr. Miller for defendant continued the offer:

"That the plaintiff and the committee of individuals representing the chamber of commerce spent a considerable time and effort to secure the signatures of all the property owners within the four blocks above described, and after they failed to do this agents of the Commercial Light approached Mr. Stevenson and told him that it would be impossible to secure the signatures of these owners unless he as one of the chief property owners and as president of the chamber of commerce led the way by signing a contract presented to him for signatures on his property.

Mr. Stevenson discussed the basis on which he would sign the contracts, that is, that his signature would be placed thereon on condition that that be used to secure the signatures of the other owners, and the agents of the Commercial Light assured him that was their reason for requesting his signature, and agreed with him that that would be the condition on which he would sign, and that the contracts would not be binding unless they, the agents of the Commercial Light Company succeeded in getting the signatures of the other property owners on both sides of Cottage Grove avenue from 79th to 83rd streets."

The offer also continued that efforts to the end of securing such other signatures, except signatures of owners of a portion of the first two blocks, were unsuccessful; that in violation of the understanding with defendant, plaintiff "on its own responsibility and without consent on the part of Mr. Stevenson or of the other owners whose signatures had been secured under the same conditions as that of Mr. Stevenson, proceeded to install lights in the blocks from 79th to 81st street." Defendant's attorney also offered to show that agents for plaintiff made statements to the effect that the lights had been installed "as a demonstration and as a sample"

of lights for a longer period than the four blocks mentioned. At-
torney for plaintiff then advised at the time of the meeting of
this Chamber of Commerce that the plaintiffs were held in the fall
of 1927 and early next winter and also were held throughout the
spring of 1928, and continuing his offer, stated that plaintiff
submitted evidence and witness; that defendant appointed a com-
mittee of the members of the Chamber of Commerce to cooperate with
plaintiff for the purpose of securing the signatures of the property
owners to contracts for the installation of lights affecting their
national property. Mr. Miller for defendant continued the offer:
"That the plaintiff and the committee of individuals pro-
posing the number of contracts grant a considerable time and ef-
fort to secure the signatures of all the property owners within the
four blocks above described, and after they failed to do this within
of the specified time, Mr. Stevenson said to him that
it would be impossible to secure the signatures of these owners un-
less he as one of the chief property owners and as president of the
Chamber of Commerce led the way by signing a contract presented to
him for signature on his property.
Mr. Stevenson signed the same on which he would sign
the contract, that is, that the signature would be placed thereon
on condition that he would be held to secure the signatures of the
other owners, and the right of the commercial light mentioned him
that was their reason for signing his signature, and agreed with
him that he would be the condition on which he would sign, and
that the contract would not be signed unless they, the owners of
the commercial light, would be held to secure the signatures of
the other property owners on both sides of college drive avenue
from 1928 to the present."
The offer also continued that efforts to the end of securing such
other signatures, except signatures of owners of a portion of the
first two blocks, were unsuccessful; that in violation of the under-
standing with defendant, plaintiff "on its own responsibility and
without consent on the part of Mr. Stevenson or of the other owners
whose signatures had been secured under the same conditions as that
of Mr. Stevenson, procured to install lights in the blocks from
which he had signed." Defendant's attorney also offered to show
that efforts for plaintiff made subsequent to the effect that the
lights had been installed "as a demonstration and as a warning"

to the rest of the owners from 81st to 83rd streets; that the installation of these lights was an additional sales argument on the part of plaintiff in its efforts to secure the signatures of other owners, and that the fact that defendant and other owners did not expressly object to the installation of the lights was not to be construed as an admission on their part that they considered themselves bound at the time that they signed these contracts or that they had ratified the signatures on these contracts upon the installation of the lights; that the witnesses would testify that the installation of light on a program covering less than the four blocks mentioned was valueless to them and to their property.

To this offer the attorney for plaintiff objected on the ground that "if permitted it is an attempt to vary the terms of a written, sealed instrument by parol, and on the further ground that the statements are conclusions and indefinite and ambiguous, without a statement of the definite dates, and on the ground that the defendant is attempting to vary the terms of a written, sealed instrument by parol in conversations that occurred six or eight months before the signature of Plaintiff's Exhibit 1." The attorney for defendant then stated that it was the position of defendant that this was not an attempt to vary the terms of a written instrument, but that it was merely an offer to prove that there was never a legal delivery of the contract in question with an intent on the part of the defendant that it become binding presently, and that the delivery was based upon a condition which plaintiff did not fulfill.

The court, however, held that the evidence was not admissible, and having excluded it directed the jury to return a verdict for plaintiff in the amount for which judgment was entered.

Defendant argues that the evidence offered was admissible for the purpose of showing that the written instrument was never

to the rest of the evidence from the first statement; that the installation of these lights was an individual effort on the part of the defendant in the effort to secure the signature of other owners, and that the fact that defendant and other owners did not expressly object to the installation of the lights was not to be construed as an admission on their part that they considered themselves bound at the time that they signed these contracts or that they had ratified the signature on these contracts upon the installation of the lights; that the witness would testify that the installation of lights was a program covering more than the four blocks mentioned was unknown to him and to their property. It is this officer the evidence is being introduced on the ground that it is pertinent to the case to vary the terms of a written, sealed instrument of fact, and on the latter being that the statements are occasional and individual and a witness, without a statement of the defendant's name, and on the ground that the defendant is attempting to vary the terms of a written, sealed instrument by oral in conversation that occurred six or eight months before the signature of the defendant's Exhibit 1. The evidence for defendant then stated that it was the action of defendant that this was not an attempt to vary the terms of a written instrument, but that it was merely an offer to prove that there was never a legal delivery of the evidence in question with an intent on the part of the defendant that it become binding generally, and that the delivery was placed upon a condition which defendant did not

withhold.

The court, however, held that the evidence was not admissible, and having concluded it directed the jury to return a verdict for defendant in the amount for which defendant was entitled. Defendant argues that the evidence offered was inadmissible for the purpose of showing that the written instrument was never

actually delivered; that the evidence would not vary the terms of the written agreement and that the court erred in excluding the offered evidence. To these propositions he cites Jordan v. Davis, 108 Ill. 336; Kilgoin v. Ortell, 302 Ill. 531; Bell v. McDonald, 308 Ill. 329; Fitzkee v. Hoeflin, 187 Ill. App. 514; Northwestern Consolidated Milling Co. v. Sloan, 232 Ill. App. 266; Handley v. Drum, 237 Ill. App. 587, and Sugar v. Marinello, 260 Ill. App. 85, while plaintiff cites Ryan v. Cooke, 172 Ill. 302; Riley v. International Banana Food Co., 185 Ill. App. 629, and Stanley v. White, 160 Ill. 605, which are to the contrary, as it is argued. We shall not undertake the task of reviewing at length all these opinions as to the facts and the law. There are statements in the opinions which cannot be reconciled, although we think the decisions made are consistent. The test, as stated in Stanley v. White, is whether the party to be obligated (in that case, the grantor) parted with the control of the writings and whether he had a right to demand them back before the transaction was completed. In Ryan v. Cooke the court stated in substance that it might be shown by parol evidence that a writing was not to be delivered until some condition should be performed, but that it could not be shown that an actual delivery had been made under an agreement that it would not be operative unless a condition should be performed. That case also seems to hold that an obligee may not act as an escrowee. In the Riley case an agreement which related solely to a condition or contingency upon which after delivery the contract was to become inoperative, it was held might not be shown by parol evidence. In brief, as we understand the cases, a condition precedent, although manual possession is given, may be shown by parol, but a delivery to become inoperative upon the happening of a condition subsequent may not.

In Northwestern Consol. Milling Co. v. Sloan, *supra*, this court quoted with approval the language of 5 Wigmore on Evidence, 2nd ed., secs. 2400, 2408, 2410 and 2435, where the author states the practical difficulty which arises in the application of the rule and concludes "that the finality of the writing as a jural act depends upon the circumstances of each case." In that case the defendant offered evidence tending to show that at the time the defendant executed the writing he delivered it to the agent of the vendor with the statement that the agent should take it to his principal and that the clause which stated that the flour sold should be delivered within four months should be changed to "as needed." The writing by its terms was "subject to confirmation." The evidence offered was at first admitted and afterwards on motion stricken. This was held to be error, although the opinion of this court intimates that after the decision there was "not much of the parol evidence rule left." We do not think that decision is inconsistent with the cases cited. The stricken evidence showed that the change to be made in the writing was a condition precedent to delivery, and this was the intention of the parties.

It is elementary in the law that a present delivery of a writing with the intention that the parties thereto shall become bound thereby, is an essential element in any valid contract. The rule is applicable to all kinds of writings, whether under seal or not and whatever may be the subject matter. The courts of Illinois in numerous cases have followed the general rule announced by the House of Lords in Xenos v. Wickman, L. R. 2 H. L. 296, which Professor Williston guesses came about through the influence of the civil law on our jurisprudence and which he says was responsible for the substitution of the subjective test of that law for the objective test theretofore applied by the common law. Williston on Contracts, vol. 1, sec. 211, p. 423, and see Illinois cases there cited, in-

In Northwestern Loan Co. v. Wilson, 1891, 111 Ill. 400, this

court stated with approval the language of a witness in evidence, and ed., 1891, 111 Ill. 400, and 111 Ill. 400, where the witness states

the practical difficulty which arises in the application of the rule and announces "that the liability of the witness as a juror and

depends upon the circumstances of each case." In that case the defendant offered evidence tending to show that at the time the de-

fendant executed the writing he delivered it to the agent of the vendor with the statement that the agent would take it to his

principal and that the clause which stated that the first note should be delivered within four months should be changed to "as

needed." The writing by its terms was "subject to condition." The evidence offered was at first admitted and afterwards on motion

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not and whatever may be the subject matter. The courts of Illinois in numerous cases have followed the general rule announced by the

House of Lords in Scott v. Bragg, 11 Q. B. 1, 1856, which states that "written contracts come about through the influence of the civil

law on our intercourse and which he says was responsible for the substitution of the subject-matter of that law for the objective

test theretofore applied by the common law. Williston on Contracts, vol. 1, sec. 211, p. 423, and see Illinois cases there cited, in-

cluding Little v. Eaton, 267 Ill. 623.

In the comparatively recent case of Huber v. Williams, 338 Ill. 313, our Supreme court said:

"In determining whether there has been a delivery the intention of the grantor is the controlling factor. A delivery may be made by acts without words, by words without acts, or by both words and acts, and anything which clearly manifests the grantor's intention that the deed becomes operative and effectual, that he loses control over it and that the grantee becomes possessed of the estate, constitutes a sufficient delivery."

The rule is not different as to other writings, and the cases seem to agree that a party who signs and after signing gives manual possession of a writing complete upon its face to another party, has presumptively made a delivery and that the burden is upon him to establish the contrary. In the recent case of Tegtmeyer v. Nordlund, 259 Ill. App. 247, this court held with reference to a negotiable instrument that testimony to the effect that it was stated at the time the instrument was given that the bank would take care of it tended to contradict the promise to pay, and that the evidence was not admissible to thus vary the terms of an instrument which was in writing. In that case we quoted with approval from Handley v. Drum, 237 Ill. App. 587, one of the cases upon which defendant here relies, the following statement:

"It is elementary that the defendants could not show by parol, even as against the payee of the note, that the parties had an understanding that the contract in fact was conditional. It is a fundamental part of the law of contracts, to which there are very few exceptions, that a party to a written contract may not contradict the terms of that contract by parol. But it is equally well established that such a party may show that the contract claimed to exist was in fact never fully executed, -- that although it was signed by him, he never delivered it or that there was merely a conditional delivery and that the condition has failed. In so doing, the written terms of the contract are not varied by parol but the showing made is merely to the effect that the contract never was completely executed."

An examination of the offer made leaves us without the information necessary to determine that defendant proposed to prove actual facts which would be sufficient to overcome the presumption arising from the manual delivery of the writing to plaintiff. In

including Little v. Wilson, 229 Ill. 623.

in the comparatively recent case of Wright v. Williams.

325 Ill. 513, our Supreme Court said:

"In determining whether there was a delivery the intention of the donor is the controlling factor. A delivery may be made by acts without words, by words without acts, or by both words and acts, and any instrument which manifests the donor's intention that the deed become operative and effectual, that he loses control over it and that the grantee become possessed of the estate, constitutes a valid delivery."

The rule is not different as to other writings, and the

cases seem to agree that a party was alone and after signing gives

manual possession of a writing complete upon the face to another

party, and prescriptively made a delivery, and that the burden is

upon him to establish the contrary. In the recent case of Leffler

v. Nordland, 229 Ill. App. 247, this court held with reference to a

negotiable instrument that testimony to the effect that it was

stated at the time the instrument was given that the bank would take

care of it tended to corroborate the promise to pay, and that the

evidence was not sufficient to vary the terms of an instrument

which was in writing. In that case we quoted with approval from

Langley v. Dyer, 227 Ill. App. 587, one of the cases upon which

defendant here relies, the following statement:

"It is elementary that the defendant could not show by parol, even as against the payee of the note, that the parties had an understanding that the contract in fact was conditional. It is a fundamental part of the law of contracts, to which there are very few exceptions, that a party to a written contract may not contradict the terms of that contract by parol. But it is equally well established that even a party may show that the contract claimed to exist was in fact never fully executed, -- that although it was signed by him, he never delivered it or that there was merely a conditional delivery and that the condition was failed. In so being, the written terms of the contract are not varied by parol but the showing made is merely to the effect that the contract never was completely executed."

An examination of the other cases leaves us without the in-

formation necessary to determine that defendant proposed to prove

actual facts which would be sufficient to overcome the presumption

arising from the manual delivery of the writing to plaintiff. In

the first place, the conversations to which he refers are remote in time; some of them precede by almost a year the date of the execution of the writing. The writing at the time of these conversations was not in existence at all nor did it come into existence until many months thereafter. In the second place, the contents of the offer are indefinite. Just what was said and when it was said are all indefinite and are stated only as the conclusions of the person making the statement rather than as the actual facts to which defendant's witnesses would testify. The offer, for instance, states that defendant discussed the basis on which he would sign the contracts and that his signature would be placed thereon on condition that it be used to secure the signatures of the other owners. We know from this statement what the conclusion of the attorney was, but we are left wholly in ignorance as to what defendant said to anybody, when he said it, where he said it, who was present when he said it, or who, if anyone, made any reply to him, and where and when and what was said in making such reply. Our Supreme court has held that an offer of proof must state the facts and not the conclusions of the persons making the offer. Martin v. Hertz, 224 Ill. 84; Goodrich v. City of Chicago, 218 Ill. 18. Moreover, the cases hold that an objection to an offer is properly sustained, even where some of the matters are proper, if others are improper. The People v. Venard, 168 Ill. App. 254; Riemensnider v. Riemensnider, 179 Ill. App. 209. In the next place, after the execution of the contract here, complete on its face, two statements in writing were executed supplementary thereto, each of which confirmed the original contract. There was no offer to show that these supplementary writings, manual possession of which was given to plaintiff, were put in plaintiff's possession with any condition precedent attached.

the first place, the conversations to which he refers are remote in time; some of them probably by almost a year. The date of the execution of the will. The will being at the time of these conversations was not in existence and did not did it come into existence until many months thereafter. In the second place, the contents of the letter are irrelevant. That what was said and when it was said are all immaterial and are stated only as the conclusion of the person making the statement rather than as the actual facts to which defendant's witnesses would testify. The other, for instance, states that defendant discussed the basis on which he would sign the contracts and that his signature would be placed thereon on condition that it be used to secure the signature of the other company. We know from this statement what the conclusion of the attorney was, but we are left wholly in ignorance as to what defendant said to anybody, when he said it, where he said it, who was present when he said it, or who, if anyone, made any reply to him, and what was said and when and where was said in making such reply. Our argument could not be that an offer of proof must state the facts and not the conclusions of the person making the offer. Wright v. Wright, 224 Ill. 101; Wright v. Wright, 224 Ill. 101. So, over, the court held that an objection to an offer is properly sustained, even where some of the matters are proper, if others are improper. Wright v. Wright, 224 Ill. 101. And, after the execution of the contract here, complete on its face, two statements in writing were executed and signed by the parties, each of which contained the identical statement. There was no offer to show that these statements were not in plaintiff's possession at which was given to plaintiff, were not in plaintiff's possession at which was given to plaintiff.

The brief of defendant makes much of the statement of the trial Judge at the time he excluded the evidence and strenuously urges that his statement of the law made at that time was incorrect. All this may be true. We are interested, however, in whether the court arrived at a correct conclusion rather than the route by which he traveled in order to reach it. The objection of defendant to the offer of proof, we hold, was properly sustained, and on the uncontradicted evidence remaining in the record, the instruction to find for the plaintiff was proper.

The judgment is therefore affirmed.

AFFIRMED.

O'Connor, P. J., and McSurely, J., concur.

The trial of defendant began with the reading of the trial judge at the time he excluded the evidence and announced only that the statement of the law made at that time was incorrect. All this may be seen. It was incorrect, however, in that the court arrived at a correct conclusion rather than the rule by which he traveled in error as to each of. The objection of defendant to the offer of proof, as said, was properly sustained, and on the material fact evidence remaining in the record, the instruction to find for the plaintiff was proper.

The judgment is therefore affirmed.

AFFIRMED.

O'Donnell, J., and Schaefer, J., concur.

35524

MAE J. SCHINDLER,
Appellee,

vs.

SINGER SEWING MACHINE COMPANY,
a Corporation,
Appellant.

62 7
APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

265 I.A. 605²

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

In an action on the case for personal injuries and on trial by jury, plaintiff secured a verdict in the sum of \$35,000, on which the court, overruling motions for a new trial and in arrest, entered judgment. Defendant urges for reversal that the court erred in its rulings on the admission and rejection of evidence and in refusing to direct a verdict for defendant at the close of all the evidence. It is also contended that the verdict is so excessive as to show passion and prejudice on the part of the jury and further that the court erred in instructing the jury.

June 18, 1929, plaintiff, a married lady about 40 years of age, while riding in an automobile driven by her husband in a westerly direction on Washington boulevard, was severely injured as a result of a collision of the automobile in which she was riding with another automobile driven, as plaintiff contends, by the servant of defendant. So far as negligence is concerned there seems to be practically no conflict in the evidence. The jury found that the servant of defendant who was driving the car was guilty of negligence proximately tending to cause plaintiff's injuries, and that plaintiff was not guilty of contributory negligence, and the verdict of the jury in these respects cannot be successfully challenged on the record.

The controlling question in the case is raised by a special plea of defendant averring that it did not own or operate the

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June 11, 1937, at 10:00 A.M., a married lady about 40 years of age, while riding in an automobile driven by her husband in a westerly direction on Washington Boulevard, was severely injured as a result of a collision of the automobile in which she was riding with another automobile driven by the defendant, at the intersection of the said boulevard and the said street. The defendant is charged with driving the automobile in which she was riding at the time of the collision at a speed in excess of the posted speed limit of 30 miles per hour. The defendant is charged with driving the automobile in which she was riding at the time of the collision in a negligent and reckless manner. The jury found that the defendant is guilty of the crime of driving an automobile in a negligent and reckless manner, and that the defendant is guilty of the crime of driving an automobile in a negligent and reckless manner.

of a defendant asserting that it had not been warned the

automobile which collided at the time in question with the automobile in which plaintiff was riding. The ultimate question in the case is that of respondent superior, but a preliminary question is raised by the contention of defendant that the court erred in admitting in evidence an alleged copy of the contract of employment between defendant and its servant Reynolds, whose negligence was responsible for the collision. Reynolds was called as a witness by plaintiff and testified that he was at the time of the accident in the service of defendant as an employee, and he identified a written contract produced as being a copy of the one he signed at the time he entered the service of defendant. He also said he had not signed any other or different contract with defendant thereafter. Plaintiff showed that several days before the trial she had caused a notice to be served upon the attorney for defendant to produce the original contract of employment, and plaintiff demanded that this original contract be produced. The attorney for defendant stated, "I have no such contract. I don't have their contracts. They can all be obtained from, I think it is Mr. Nolte who has the--." Plaintiff also offered proof tending to show that prior to the trial she caused a subpoena duces tecum in the usual form to be issued to defendant and served upon Mr. Nolte, directing that this original document be produced but that defendant failed to produce it in response to the subpoena. These facts having been shown and a copy of the contract identified by the witnesses, plaintiff offered to read it to the jury. Defendant by its attorney at first objected, whereupon the court said, "I will let him read it," in which ruling the attorney acquiesced, saying "All right."

It was the duty of defendant to obey the subpoena of the court and produce the contract or give a reason why it could not be produced. Defendant is not above the law. It is its duty to

automobile which collided at the time in question with the auto-
 mobile in which plaintiff was riding. The accident occurred in
 the case in fact of defendant's negligence. As a preliminary ques-
 tion is raised by the production of evidence that the court
 error is resulting in evidence as alleged copy of the contract
 of employment between defendant and the various payrolls, where
 negligence was responsible for the collision. Defendant was called
 as a witness by plaintiff and testified that he was at the time of
 the accident in the service of defendant as an employee, and he
 identified a written contract produced as being a copy of the
 one he signed at the time he entered the service of defendant.
 He also said he had not signed any other or different contract
 with defendant thereafter. Plaintiff showed that several days
 before the trial the defendant caused a notice to be served upon the
 attorney for defendant to produce the original contract of em-
 ployment, and plaintiff showed that this original contract be
 produced. The attorney for defendant stated, "I have no such
 contract. I don't have such contracts. They can all be ob-
 tained from, I think it is at the office of the defendant."
 Plaintiff also offered direct evidence to show that prior to the trial the
 contract a subpoena issued in the usual form to be issued to
 defendant and served upon the attorney, directing that this original
 document be produced and that defendant failed to produce it in
 response to the subpoena. These facts having been shown and a
 copy of the contract identified by the witness, plaintiff
 offered to read it in the court. Defendant by the attorney at
 first objected, whereupon the court said, "I will let him read
 it," in which ruling the attorney acquiesced, saying "All right."
 It was the duty of defendant to obey the subpoena of the
 court and produce the contract or give a reason why it could not
 be produced. Defendant is not above the law. It is the duty to

obey the law. It paid no attention to the notice. It failed to obey the subpoena. He who has evidence in his possession which he suppresses or destroys cannot escape the presumption of guilt. Omnia presumuntur contra spoliatorem is an ancient maxim applicable to this record. Rector v. Rector, (3 Gil.) 8 Ill. 105; People v. Small, 319 Ill. 437; Hudson v. Hudson, 287 Ill. 286. We hold that the court did not err in admitting this document in evidence.

Defendant also contends that it was error for the court to refuse to direct a verdict in its favor at the close of all the evidence. The undisputed evidence in the case shows that the automobile which was driven by Reynolds at the time of the accident was not the property of the defendant corporation. It also shows that Reynolds paid the rental of the garage in which his automobile was kept; that he supplied and paid for the gasoline and oil used in driving it and for its upkeep. The evidence also shows without contradiction that he received no salary from defendant; that he was without regular hours of employment and that when he pleased so to do he used the automobile for his own pleasure and for his own personal matters unconnected with defendant. The evidence also shows without contradiction that in the course of his employment very much ordinarily was left to his discretion. He could go when he wished to go and come when he wished to come; if he wished to work he could do so; if he did not wish to work he was not compelled to do so. Defendant company did not undertake to tell him how to drive his car nor upon what streets it should be driven. In the course of his work a man named Carroll, also employed by defendant corporation, worked for him. Reynolds received a part of all commissions which Carroll earned. Reynolds collected the commissions on sales made by Carroll and repaid Carroll his share of the commissions as determined by the agreement with defendant corporation. The contract between defendant and Reynolds required

obey the law. It will be observed that the notice, as it related to
 obey the law, was given in his possession when
 he was arrested or detained under the provisions of the
Constitution of the United States in an ancient maxim applicable
 to the subject. Ex parte (3 W. 11.) 8 L. 105; People v.
Wall, 130 Ill. 437; People v. Johnson, 137 Ill. 200. He held that
 the court did not err in admitting this document in evidence.
 Defendant also argues that it was error for the court to
 refuse to direct a verdict in its favor on the ground of all the
 evidence. The undisputed evidence is that the car was the prop-
 erty of the defendant at the time of the accident.
 It was not the property of the defendant corporation. It also shows
 that Reynolds sold the car to the defendant in which his name alone
 was kept; that he signed and sold for the defendant and all used
 in driving it and for its use. The evidence also shows without
 contradiction that he received no salary from defendant; that he
 was without regular hours of employment and that when he pleased
 so to do he used the car for his own pleasure and for his
 own personal affairs unconnected with defendant. The evidence
 also shows without contradiction that in the course of his employ-
 ment very much ordinarily was left to his discretion. He could go
 when he wished to and come when he wished to come; if he wished
 to work he could do so; if he did not wish to work he was not com-
 pelled to do so. Defendant's company did not interfere to tell him
 how to drive his car nor upon what streets it should be driven. In
 the course of his work as a chauffeur, he was employed by the
 defendant corporation, whereas the car, Reynolds received a part of
 all commissions which Carroll earned. Reynolds collected the
 commissions on sales made by Carroll and retained Carroll his share
 of the commissions as determined by the agreement of the defendant
 corporation. The evidence between defendant and Reynolds relative

that Reynolds must have an automobile. At the time he began his employment defendant loaned him the money with which to buy it, and he executed a mortgage back in defendant's favor. The title of the automobile and the license were in Reynold's name. No one except Reynolds had any right to use the car.

From these undisputed facts defendant argues that as a matter of law Reynolds was an independent contractor working for himself, hiring his own men and doing business according to his own plans without control or hindrance by defendant. It is urged that the defendant corporation had no control over him and in no sense had any dominion over his movements or the details of his work. He was employed to sell machines on a commission basis, got his own prospects, sold to them and received a commission; and it is argued that all that the defendant company had to do in the matter was to pay Reynolds his commission after he had earned it. It is urged therefore that the rule of respondent superior is not applicable in this case and that under the undisputed evidence and as a matter of law plaintiff is not entitled to recover, and that an instruction in defendant's favor should have been given by the court. The writing which is in evidence provides that in consideration of the company taking the employed into its service, he agrees:

"To devote his entire time and attention exclusively to collecting such accounts as may be entrusted to him by the Company and to selling and leasing sewing machines and supplies, belonging to the Company, and furnished to the Employed by it for said purposes and none other ***.

To report in writing daily or weekly, as directed from time to time, upon forms furnished by the Company, giving a full and complete account of all business transacted for the Company and to deliver over to the Company each and every day all money and specie collected the previous working day and not to mingle the same or any portion thereof with the funds of the Employed***.

The Company agrees to pay the Employed weekly in full for all services rendered and expenses incurred, the following remuneration ***:--

A. Selling remuneration on all Leases, Notes, Time and Cash Sales, of Family Machines**.

B. ** Whenever the Employed allows a customer an amount for old machine which is greater than the maximum authorized the excess shall be deducted from the remuneration payable to the Employed

that Reynolds must have been authorized. At the time he began his employment defendant learned his true name was not Ray, it was not executed a mortgage upon the defendant's favor. The filing of the mortgage and the license were in Reynolds' name. No one except Reynolds had any right to use the name.

From these undisputed facts defendant argues that as a matter of law Reynolds was an authorized agent for defendant himself. Relying on his own and other evidence according to his own plans without control or guidance by defendant. It is urged that the defendant's assertion has no control over him and in no sense had any dominion over his movements or the details of his work. He was employed to sell insurance on a commission basis, not his own property, and to whom and received a commission; and it is urged that all that the defendant company has to do is the master to pay Reynolds his commission after he has earned it. It is urged therefore that the sale of insurance by Reynolds is not authorized in this case and that under the defendant's evidence and as a matter of law defendant is not entitled to recover, and thus an instruction in defendant's favor should have been given by the court. The writing herein is in evidence provided that in consideration of the company taking the witness from his service, he agrees:

"To devote his entire time and attention exclusively to collecting such amounts as may be required to pay to the company and to selling and issuing such policies and contracts, belonging to the company, and to deliver to the company all the said policies and contracts as soon as they are issued.

To report to the company daily or weekly, as directed from time to time, upon forms furnished by the company, giving a full and complete account of all business transacted for the company and to deliver over to the company cash and every day all moneys and receipts collected for the company and not to divide the same of any person connected with the work of the company.

The company agrees to pay the witness weekly the full for all moneys collected and expenses incurred, and the following amounts:

1. During the first year of his service, \$100.00 per month, and cash sales of 10% of his business.

2. For the second year of his service, \$100.00 per month, and cash sales of 10% of his business.

3. For the third year of his service, \$100.00 per month, and cash sales of 10% of his business.

4. For the fourth year of his service, \$100.00 per month, and cash sales of 10% of his business.

5. For the fifth year of his service, \$100.00 per month, and cash sales of 10% of his business.

6. For the sixth year of his service, \$100.00 per month, and cash sales of 10% of his business.

7. For the seventh year of his service, \$100.00 per month, and cash sales of 10% of his business.

8. For the eighth year of his service, \$100.00 per month, and cash sales of 10% of his business.

9. For the ninth year of his service, \$100.00 per month, and cash sales of 10% of his business.

10. For the tenth year of his service, \$100.00 per month, and cash sales of 10% of his business.

11. For the eleventh year of his service, \$100.00 per month, and cash sales of 10% of his business.

12. For the twelfth year of his service, \$100.00 per month, and cash sales of 10% of his business.

13. For the thirteenth year of his service, \$100.00 per month, and cash sales of 10% of his business.

14. For the fourteenth year of his service, \$100.00 per month, and cash sales of 10% of his business.

15. For the fifteenth year of his service, \$100.00 per month, and cash sales of 10% of his business.

16. For the sixteenth year of his service, \$100.00 per month, and cash sales of 10% of his business.

17. For the seventeenth year of his service, \$100.00 per month, and cash sales of 10% of his business.

18. For the eighteenth year of his service, \$100.00 per month, and cash sales of 10% of his business.

19. For the nineteenth year of his service, \$100.00 per month, and cash sales of 10% of his business.

20. For the twentieth year of his service, \$100.00 per month, and cash sales of 10% of his business.

21. For the twenty-first year of his service, \$100.00 per month, and cash sales of 10% of his business.

22. For the twenty-second year of his service, \$100.00 per month, and cash sales of 10% of his business.

23. For the twenty-third year of his service, \$100.00 per month, and cash sales of 10% of his business.

24. For the twenty-fourth year of his service, \$100.00 per month, and cash sales of 10% of his business.

25. For the twenty-fifth year of his service, \$100.00 per month, and cash sales of 10% of his business.

26. For the twenty-sixth year of his service, \$100.00 per month, and cash sales of 10% of his business.

27. For the twenty-seventh year of his service, \$100.00 per month, and cash sales of 10% of his business.

28. For the twenty-eighth year of his service, \$100.00 per month, and cash sales of 10% of his business.

29. For the twenty-ninth year of his service, \$100.00 per month, and cash sales of 10% of his business.

30. For the thirtieth year of his service, \$100.00 per month, and cash sales of 10% of his business.

31. For the thirty-first year of his service, \$100.00 per month, and cash sales of 10% of his business.

32. For the thirty-second year of his service, \$100.00 per month, and cash sales of 10% of his business.

33. For the thirty-third year of his service, \$100.00 per month, and cash sales of 10% of his business.

34. For the thirty-fourth year of his service, \$100.00 per month, and cash sales of 10% of his business.

35. For the thirty-fifth year of his service, \$100.00 per month, and cash sales of 10% of his business.

36. For the thirty-sixth year of his service, \$100.00 per month, and cash sales of 10% of his business.

37. For the thirty-seventh year of his service, \$100.00 per month, and cash sales of 10% of his business.

38. For the thirty-eighth year of his service, \$100.00 per month, and cash sales of 10% of his business.

39. For the thirty-ninth year of his service, \$100.00 per month, and cash sales of 10% of his business.

40. For the fortieth year of his service, \$100.00 per month, and cash sales of 10% of his business.

41. For the forty-first year of his service, \$100.00 per month, and cash sales of 10% of his business.

42. For the forty-second year of his service, \$100.00 per month, and cash sales of 10% of his business.

43. For the forty-third year of his service, \$100.00 per month, and cash sales of 10% of his business.

44. For the forty-fourth year of his service, \$100.00 per month, and cash sales of 10% of his business.

45. For the forty-fifth year of his service, \$100.00 per month, and cash sales of 10% of his business.

46. For the forty-sixth year of his service, \$100.00 per month, and cash sales of 10% of his business.

47. For the forty-seventh year of his service, \$100.00 per month, and cash sales of 10% of his business.

48. For the forty-eighth year of his service, \$100.00 per month, and cash sales of 10% of his business.

49. For the forty-ninth year of his service, \$100.00 per month, and cash sales of 10% of his business.

50. For the fiftieth year of his service, \$100.00 per month, and cash sales of 10% of his business.

51. For the fifty-first year of his service, \$100.00 per month, and cash sales of 10% of his business.

52. For the fifty-second year of his service, \$100.00 per month, and cash sales of 10% of his business.

53. For the fifty-third year of his service, \$100.00 per month, and cash sales of 10% of his business.

54. For the fifty-fourth year of his service, \$100.00 per month, and cash sales of 10% of his business.

55. For the fifty-fifth year of his service, \$100.00 per month, and cash sales of 10% of his business.

56. For the fifty-sixth year of his service, \$100.00 per month, and cash sales of 10% of his business.

57. For the fifty-seventh year of his service, \$100.00 per month, and cash sales of 10% of his business.

58. For the fifty-eighth year of his service, \$100.00 per month, and cash sales of 10% of his business.

59. For the fifty-ninth year of his service, \$100.00 per month, and cash sales of 10% of his business.

60. For the sixtieth year of his service, \$100.00 per month, and cash sales of 10% of his business.

61. For the sixty-first year of his service, \$100.00 per month, and cash sales of 10% of his business.

62. For the sixty-second year of his service, \$100.00 per month, and cash sales of 10% of his business.

63. For the sixty-third year of his service, \$100.00 per month, and cash sales of 10% of his business.

64. For the sixty-fourth year of his service, \$100.00 per month, and cash sales of 10% of his business.

65. For the sixty-fifth year of his service, \$100.00 per month, and cash sales of 10% of his business.

66. For the sixty-sixth year of his service, \$100.00 per month, and cash sales of 10% of his business.

67. For the sixty-seventh year of his service, \$100.00 per month, and cash sales of 10% of his business.

68. For the sixty-eighth year of his service, \$100.00 per month, and cash sales of 10% of his business.

69. For the sixty-ninth year of his service, \$100.00 per month, and cash sales of 10% of his business.

70. For the seventieth year of his service, \$100.00 per month, and cash sales of 10% of his business.

71. For the seventy-first year of his service, \$100.00 per month, and cash sales of 10% of his business.

72. For the seventy-second year of his service, \$100.00 per month, and cash sales of 10% of his business.

73. For the seventy-third year of his service, \$100.00 per month, and cash sales of 10% of his business.

74. For the seventy-fourth year of his service, \$100.00 per month, and cash sales of 10% of his business.

75. For the seventy-fifth year of his service, \$100.00 per month, and cash sales of 10% of his business.

76. For the seventy-sixth year of his service, \$100.00 per month, and cash sales of 10% of his business.

77. For the seventy-seventh year of his service, \$100.00 per month, and cash sales of 10% of his business.

78. For the seventy-eighth year of his service, \$100.00 per month, and cash sales of 10% of his business.

79. For the seventy-ninth year of his service, \$100.00 per month, and cash sales of 10% of his business.

80. For the eightieth year of his service, \$100.00 per month, and cash sales of 10% of his business.

81. For the eighty-first year of his service, \$100.00 per month, and cash sales of 10% of his business.

82. For the eighty-second year of his service, \$100.00 per month, and cash sales of 10% of his business.

83. For the eighty-third year of his service, \$100.00 per month, and cash sales of 10% of his business.

84. For the eighty-fourth year of his service, \$100.00 per month, and cash sales of 10% of his business.

85. For the eighty-fifth year of his service, \$100.00 per month, and cash sales of 10% of his business.

86. For the eighty-sixth year of his service, \$100.00 per month, and cash sales of 10% of his business.

87. For the eighty-seventh year of his service, \$100.00 per month, and cash sales of 10% of his business.

88. For the eighty-eighth year of his service, \$100.00 per month, and cash sales of 10% of his business.

89. For the eighty-ninth year of his service, \$100.00 per month, and cash sales of 10% of his business.

90. For the ninetieth year of his service, \$100.00 per month, and cash sales of 10% of his business.

91. For the ninety-first year of his service, \$100.00 per month, and cash sales of 10% of his business.

92. For the ninety-second year of his service, \$100.00 per month, and cash sales of 10% of his business.

93. For the ninety-third year of his service, \$100.00 per month, and cash sales of 10% of his business.

94. For the ninety-fourth year of his service, \$100.00 per month, and cash sales of 10% of his business.

95. For the ninety-fifth year of his service, \$100.00 per month, and cash sales of 10% of his business.

96. For the ninety-sixth year of his service, \$100.

C. The Employed agrees to maintain and use his own vehicle in the business of the Company.***

THIRD. Whenever, on any account, a machine is repossessed or the balance is deemed worthless and is charged off by the Company, the Employed agrees to immediately refund to the Company - any unpaid remuneration shall be forfeited.***

SIXTH. The Employed shall sell and lease machines at the prices established for the time being by the Company, and the Company shall have the right to reject any sale or lease made by the Employed***.

EIGHTH. The Employed agrees to repossess and deliver to the Company any machine it may direct without additional remuneration. Accounts in his hands for collection may be withdrawn at any time at the option of the Company, or collections thereon by other collectors may be authorized by the Company if deemed advisable. Should the Company desire to know the location of any machines or accounts entrusted to the Employed, he shall promptly locate the same to the satisfaction of the Company's agent or managing salesman.***

TWELFTH. This agreement shall remain in full force unless superseded by a new one in writing duly executed; and, until such time, no change or modification of its terms shall be valid or binding. This agreement may be terminated at the pleasure of either party."

As plaintiff suggests, the contract seems to be simple and unambiguous. Throughout it Reynolds is referred to as the "Employed," and it is only fair to presume that one employed is an employee, which is defined in Funk & Wagnalls New Standard Dictionary of the English language as "One who works for wages, or a salary; ^{who is} one/engaged in the service of or is employed by another." The contract says that the company is "taking the Employed into its service" and shows that he is to undertake to make sales contracts for the benefit of the defendant and under terms such as defendant may direct. According to the terms of this contract he is to do the work of defendant company, not his own, and the goods which he undertakes to dispose of belong to defendant company, not to himself. He was given possession of them, but he is by the contract obligated to account for them. The contract shows that the company had the right to control his actions with reference to this work and the right to direct in what manner the work should be performed. He was to report daily, if his employer directed him to do so, or

Q. The Employer agrees to maintain and use his own vehicle in the business of the Company.

ANS. However, on any business, a vehicle is required or the business is deemed necessary and is owned by the Company, the Employer agrees to immediately return to the Company any unpaid remuneration shall be forfeited.

Q. The Employer shall not and shall not permit any person to establish the fact that he is the owner of the Company and the Company shall have the right to reject any sale of goods made by the Employer.

ANS. The Employer agrees to reimburse and deliver to the Company any machine it may have lost or damaged or destroyed. The Company in its discretion may be withdrawn at any time at the option of the Company, or collection of any other collection may be made by the Company at any time. Should the Company desire to know the location of any machine or machine destroyed in the business, it shall promptly locate the same by the collection of the Company's agent or machine, machine.

Q. This agreement shall remain in full force and effect until a new one is written and accepted; and, until such time, no change or modification of the terms shall be valid or binding. This agreement may be terminated at the pleasure of either party.

As witness my hand, the Employer signs to be signed and

unpublished. The agent is required to be signed by the

"Employer", and it is only this to be signed and the Employer is an

employee, which is defined in the Company's New Standard Division

any of the other language of "one who works for wages, or a

who is employed in the service of or is employed by another."

The contract says that the Employer is "having the Employer into the

service" and says that he is to be treated as a full-time employee

for the benefit of the Employer and under terms such as to be

any other. According to the terms of this contract he is to be

the work of full-time employee, not his own, and the work which he

understands to be of service to the Employer, and he shall

will. It was the intention of the law, but it is in the contract

obligation to accept the work. The contract shows that the employer

and the law is against the employee with reference to this work and

the right to demand that the work should be performed.

if the employer directed the report to be made weekly, then he was to report weekly. In all cases he was to give a complete account. The prices at which he could sell were fixed by the company. He could not allow discounts thereon except with its consent. If he did so, the discounts were deducted from his remuneration. If the company so decided, it could direct him to repossess any machine which he had sold and which he had wished to retain, and he was required to promptly locate any machine sold to the satisfaction of his superior. As the last paragraph shows, defendant could discharge him at any time it wished to do so. Indeed, the contract in its terms and the manner in which Reynolds was required to perform services thereunder is not dissimilar to that which was considered in the case of Singer Mfg. Co. v. Rahn, 10 Sup. Ct. Rep. 175, where the Supreme Court of the U. S. said that the trial court rightly held that the salesman "was defendant's servant, for whose negligence in the course of his employment the defendant was responsible to the plaintiff."

Moreover, the evidence here discloses that at the very time this accident occurred Reynolds and Carroll were on their way to carry out specific orders given by the manager of the defendant company which directed Reynolds to go to 5614 North Kimball avenue, where he had made a sale, for the purpose of straightening^{matters} out in such a way that a collection of the money which was claimed to be due would result. In the recent case of Hartley v. Red Ball Transit Co., 344 Ill. 534, our Supreme court said, quoting from Nelson Bros. v. Industrial Commission, 330 Ill. 27:

"The right to control the manner of doing the work is the principal consideration which determines whether the worker is an employee or independent contractor. (Decatur Railway & Light Co. v. Industrial Board, 276 Ill. 472.) The test of the relationship is the right to control. It is not the fact of actual interference with the control, but the right to interfere, which makes the difference between an independent contractor and a servant or agent."

The absolute right of this defendant to control the actions

of Reynolds is established under this contract. Not only did it have the right to control his actions, but it was in fact controlling them at the time this accident occurred.

It would unduly extend this opinion to review at length the cases which are cited by defendant; practically all of them are from other jurisdictions. Nor are we ready to admit that they are inconsistent with the law of our own State. However, the decisions from this jurisdiction which we have cited must be regarded as conclusive and as settling the question so far as this court is concerned. In conformity therewith, we hold the court did not err in refusing to direct a verdict in favor of defendant.

Defendant contends that the court erred in refusing to give at its request the following instruction:

"The jury are instructed that an independent contractor is one who contracts to do work, furnishes his own assistants, and executes the work, and either entirely in accord with his own ideas or in accordance with a plan previously given to him by the person for whom the work is done, without being subject to the orders of the latter in respect to the details of the work. The jury are further instructed that a person employing an independent contractor is not responsible for the negligence of such independent contractor while so engaged as an independent contractor."

The brief of defendant expresses "amaze^{ment}" at the refusal of this instruction. Upon the record as it appears, the question of whether under this written contract Reynolds was or was not an independent contractor was^a question of law and not a question of fact for the jury. Rosenbaum Bros. v. Devine, 271 Ill. 354; Hartley v. Red Ball Transit Co., 259 Ill. App. 229; Pioneer Fireproof Construction Co. v. Hansen, 176 Ill. 100. It was therefore not error for the court to refuse to instruct the jury as if that issue were one of fact. This instruction and others concerning which defendant complains were therefore properly refused.

It is next urged that the verdict was excessive, and in the same connection it is contended that the court erred in giving

of which is established under this contract. Not only did it have the right to control this contract, but it was in fact controlling them at the time this contract was made.

It would be very easy to find a number of instances where the cases which are cited by defendant; practically all of them are from other jurisdictions. Now we are going to show that they are inconsistent with the law of our own state. However, the decisions from this jurisdiction which we have cited must be regarded as authoritative and as settling the question as far as this court is concerned. In conclusively characterizing, we hold the court did not err in refusing to direct a verdict in favor of defendant.

Defendant contends that the court erred in refusing to give it the benefit of the following instruction:

"The jury are instructed that an independent contractor is one who contracts to do work, to employ his own employees, and to execute the work, and that liability is accorded him in his own name or in accordance with a power of attorney given to him by the party for whom the work is done, without being subject to the orders of the latter in respect to the details of the work. The jury are further instructed that a person employing an independent contractor is not responsible for the negligence or such independent contractor while he engages as an independent contractor."

The brief of defendant expresses "error" at the refusal of this instruction. Now the reason as it appears, the question of whether under this contract defendant is responsible for or not is in dispute. Defendant's contention of law was not a question of fact.

For the jury. Wheeler v. City of Chicago, 171 Ill. 324; Wheeler v. City of Chicago, 171 Ill. 324; Wheeler v. City of Chicago, 171 Ill. 324.

Wheeler v. City of Chicago, 171 Ill. 324. It was therefore not error for the court to refuse to direct the jury as it had done with one of them. This court has not only announced which defendant's contention was correct, but also that it was correct.

It is not proper that the verdict was excessive, and in the same connection it is contended that the court erred in giving

an instruction on the question of damages. The precise instruction, however, was approved in the recent case of Arndt v. Riverview Park Co., 259 Ill. App. 210, on the authority of Chicago & M. Electric R. Co. v. Ullrich, 213 Ill. 170; Parmelee Co. v. Wheelock, 224 Ill. 194; Brennan v. City of Streator, 256 Ill. 468, and Caughy v. Peoria Ry. Co., 164 Ill. App. 455. We adhere to that decision.

Defendant urges with earnestness that the verdict of the jury is excessive and discloses passion and prejudice. It points out that plaintiff was a housewife, not a wage earner, and urges that the court should not be unmindful of the fact that the buying value of the dollar is much greater now than when former judgments for large amounts were affirmed. Defendant says that interest on this judgment at six per cent would amount to \$2,100 a year; that if plaintiff should live 20 years she would receive in interest \$42,000 and would still have the \$35,000 left, or would receive a total of \$77,000. Counsel does not inform us just where that amount of money could be now invested in a safe place to yield a rate such as he names. The judgment is large and the purchasing power of the dollar has increased (whether permanently we are not able to say), but these were no light injuries which this plaintiff sustained. There was a crushing injury to her right arm in which the blood vessels and nerves were divided and the bones fractured in small pieces above the elbow joint. Some of the pieces had fallen out of the wound and were not present at the time of the Doctor's first examination. There were then only a few tissues holding the forearm to the arm, and the whole wound became infected; the skin was torn from the middle of the arm to the forearm. Plaintiff was in a condition of extreme shock from the injury and lost a vast amount of blood, and the surgeon was compelled to use local anaesthetic to amputate the arm above the elbow on the night of the injury. There was suppuration in the wound after the amputa-

tion and some of the skin used as a flap sloughed. The wound was drained continuously for eighteen months, and small pieces of specula or debris came out of the wound. The lower end of the bone is jagged. A physician who saw the wound or the stump of her arm the day before the trial testified it was irregular and covered with a lot of scar tissue and upon manipulation of the arm the patient suffered pain; that in his opinion her arm was too tender for an artificial arm and that the patient still kept the arm bandaged so the clothing would not touch it. Another physician testified that plaintiff was troubled with a twitching of the stump which she was unable to control, which twitching was due to injuries to the nerves. She was in the hospital three weeks during which time she was unable to sleep or rest. The pain in her head was intense and from that pain even now she has little relief. She has been dizzy most of the time since the accident and cannot stoop without bringing on severe dizziness. She was in bed at home for three months after she returned from the hospital. At the time of the trial (a year and eight months after the accident) she was in bed the greater part of the time every day. As the arm was sloughing it had to be dressed every day. She is unable to put on her clothes without help and is unable to cut a piece of meat or bread, and it is only by a struggle that she is able to keep the stump of the arm from jumping or twitching. In addition to the loss of the arm, her knee was severely injured and at the time of the trial she was unable to put her weight on it. She received at the time of the injury a circular four inch gouge in the hip.

The verdict is large, but the injury is most severe, and we have sustained verdicts as large as this in other cases/ Laker v. Collins, 252 Ill. App. 238. We are here presented with a case where through negligence a woman in the prime of life and in

tion and some of the skin used as a flap sutured. The wound was drained continuously for eighteen months, and small pieces of escharic or debris came out of the wound. The lower end of the bone is jagged. A physician who saw the wound on the stump of her arm the day before the trial testified it was irregular and covered with a lot of scar tissue and when manipulation of the arm the patient suffered pain; that in his opinion her arm was too tender for an artificial arm and that the patient still kept the arm bandaged as the doctor would not remove it. Another physician testified that plaintiff was troubled with a twisting of the stump which she was unable to control, after twisting was due to injuries to the nerves. She was in the hospital three weeks during which time she was unable to sleep or rest. The pain in her head was intense and from that pain even now she has little relief. She has been almost dead at the time since the accident and cannot sleep without suffering on severe distress. She was in bed at home for three months after she returned from the hospital. At the time of the trial (a year and eight months after the accident) she was in bed the greater part of the time every day. As the arm was bandaged it had to be removed every day. She is unable to put on her clothes without help and is unable to eat a piece of meat or bread, and it is only by a straitjacket that she is able to keep the stump of the arm from twisting or twisting. In addition to the loss of the arm, her knees were severely injured and at the time of the trial she was unable to put her weight on it. She received at the time of the injury a fracture of her leg, though in the hip.

The verdict is large, but the injury is most severe, and we have established various facts as this in other cases. Y. Collins, 202 Ill. App. 230. We are here presented with a case where through negligence a woman in the prime of life and in

previous good health must throughout all the years endure the pain and suffering of a dismembered body. Twelve jurors and a fair and impartial Judge have heard the evidence and awarded damages. We do not think we have the right sitting as a court of review to substitute another judgment for theirs. This verdict does not "strike everyone with the enormity and injustice of it," and Chief Justice Kent thought that was the rule by which courts of review should be governed in consideration of such questions. Coleman v. Southwick, 9 Johns (N.Y.) 45, approved in Maskaliunas v. Chicago etc. R. R. Co., 235 Ill. App. 198.

The judgment is affirmed.

AFFIRMED.

O'Connor, P. J. and McSurely, J., specially concur.

(See next page.)

MR. PRESIDING JUSTICE O'CONNOR specially concurring.

In my opinion the verdict of the jury to the effect that Reynolds, the driver of defendant's automobile, was guilty of negligence which caused plaintiff's injuries is manifestly against all the evidence. Reynolds, the driver of the automobile, Carroll, who was with him, and the disinterested witness, Ross, all gave testimony to the effect that Reynolds was forced to turn his car sharply to the north to avoid a head-on collision with the car driven by Mrs. Smith, which came in from the south and cut across in front of the east-bound traffic. There is no evidence to the contrary. And although plaintiff has sustained very severe and permanent injuries without fault on her part, yet we think the defendant is being mulcted out of \$35,000 through the fault of a third party. But this question is not presented to us on this appeal, and we think we would not be justified in raising the question here, since the defendant is represented by an experienced counsel and the point has not been raised or even suggested by him.

MR. JUSTICE MCSURELY specially concurring.

I am inclined to the view as expressed in the specially concurring opinion.

35224 MR. TARRANT: JUSTICE TARRANT ON specially concurring.

In my opinion the verdict of the jury to the effect that

Reynolds, the driver of the motorist's automobile, was guilty of

negligence also caused the motorist's injuries is manifestly against

all the evidence, Reynolds, the driver of the automobile, testified,

who was with him, and the disinterested witness, Ross, all gave

testimony to the effect that Reynolds was forced to turn his car

sharply to the north to avoid a head-on collision with the car

driven by Mrs. Smith, which came from the south and was

in front of the east-bound traffic. There is no evidence to the

contrary. And although Reynolds was sustained very severe and

permanent injuries almost fatal in her part, yet we think the

defendant is being treated out of all proportion through the fault of a

third party. But this question is not presented to us on this

appeal, and we think we would not be justified in raising the

question here, since the defendant is represented by an experienced

counsel and the point has not been raised or even suggested by him.

MR. JUSTICE ROBERTSON: I concur specially concurring.

I am inclined to the view as expressed in the specially

concurring opinion.

35561

CHARLES FRITZ,
Appellee.

vs.

A. F. DORMEYER MANUFACTURING
COMPANY, a Corporation, Successor
to the MAC LEOD MANUFACTURING
COMPANY, a Corporation,
Appellant.

63
APPEAL FROM MUNICIPAL COURT
OF CHICAGO. 7

265 I.A. 605³

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

Fritz sued the defendant corporation in the Municipal court, in his statement of claim setting up verbatim an agreement in writing dated May 8, 1929, under which he claimed defendant promised to pay him a minimum royalty for an exclusive license to manufacture and sell sewer points under patents which had been obtained by him. The statement averred that for a period of time beginning January 1, 1930, and ending January 30, 1931, defendant owed plaintiff \$650 and that payment had been refused. Defendant filed an affidavit of merits asserting as a good defense to the whole demand that plaintiff had failed to perform and keep certain promises made by him to defendant according to the terms of the contract; in particular, that he failed to deliver dies for the six inch sewer points and that certain dies furnished by him for the two inch, or midget, sewer points, were defective. The affidavit denied that under the terms of the contract defendant was obligated to pay a minimum royalty or guaranty of any kind and averred a set-off to the amount of \$329.47.

Thereafter, by leave of court, an amended claim of set-off for the sum of ~~\$500~~ was filed by defendant. There was a trial by the court and findings that \$650 was due to plaintiff on his claim and that there was due to defendant on its claim of off-set the sum of \$260.43, and judgment was entered in favor of

CHARGE FROM MUNICIPAL COURT

OF CHICAGO.

265 I.A. 605

CHARLES WHITE,
Accused.

vs.

A. T. DORSEYMAN MANUFACTURING
COMPANY, a corporation, Plaintiff
to the MAG LEAD MANUFACTURING
COMPANY, a corporation,
Plaintiff.

MR. JUSTICE BATESMAN EXAMINED THE VERDICT OF THE COURT.

White read the following corporation in the Municipal
court, in his statement of which setting up various an agreement
in writing dated May 8, 1900, under which he claimed defendant
promised to pay him a license royalty for an exclusive license to
manufacture and sell sewer pipes under patents which had been
obtained by him. The agreement averred that for a period of time
beginning January 1, 1900, and ending January 31, 1901, defendant
owed plaintiff \$250 and that payment had been refused. Defendant
filed an affidavit of service executed as a good defense to the
whole demand and plaintiff had failed to perform and pay certain
promises made by him to defendant according to the terms of the
contract; in particular, that he failed to deliver him for the
six inch sewer pipes and that certain dies furnished by him for
the two inch, or middle, sewer pipes, were defective. The affi-
davit stated that under the terms of the contract defendant was obli-
gated to pay a license royalty in conformity of any kind and averred
a set-off in the amount of \$250.47.

Thereafter, by leave of court, an amended claim of
set-off for the sum of \$250 was filed by defendant. There was a
trial by the court and findings that \$250 was due to plaintiff on
his claim and that there was no set-off defendant on the claim of set-
off the sum of \$250.47, and judgment was entered in favor of

plaintiff and against defendant for the balance amounting to \$389.57. That judgment defendant seeks to reverse by this appeal.

As the contentions of the parties require a construction and interpretation of the writing, we set it up verbatim. It is in the form of a letter by the Mackeod Mfg. Company, defendant's predecessor, dated May 8, 1929, addressed to plaintiff and accepted by him:

"This is to confirm verbal agreement that we have made with your son, Mr. George Fritz.

We are to have the exclusive selling and manufacturing rights on your line of sewer points during the life of your present patents, or any future patents that you may develop on these articles.

After January 1, 1930, we are obligated to pay you a minimum royalty of \$50.00 per month, or our contract is subject to cancellation.

This contract cannot be cancelled unless we receive six months' notice in writing.

You are to give us the use of your ^{dies} ideas on the Midget Sewer Points and the 6" Sewer Points, without any expense to us, but we are to maintain them in good working condition at our own expense. We are to use our dies on the 4" Sewer Points, without any expense to you.

In case you cancel this contract, under the provisions above named, you are to pay us \$700.00 for our dies and any stock that we may have on hand.

We are to pay you a royalty of 10% of the amount of our sales of sewer points. This royalty is payable on the 15th of the month for all sales of the previous calendar month.

You are to have the privilege of checking over our sales records at any time that you so wish, in order to satisfy yourself of the correctness of our royalty payments.

We are to give you the privilege of buying sewer points from us for retail sales from your garage at 1511 Diverscy Parkway, on the basis of our best jobber's prices.

We are to purchase your present stock of Midget Sewer Points, as our business develops, at a price of 35¢ each, and pay you for any parts that you have on hand, over and above the assembled sewer points, at your cost price. We are to purchase your 6" sewer points, not to exceed a total of 200, at a price of 50¢.

It is further understood that, in case you cancel this contract you are obligated to take not to exceed 1,000 sewer points from us, at a price of 50¢ on the 6", 40¢ on the 4" and 35¢ on the Midget.

We agree to spend \$2500.00 in the next six months to advertise and merchandise your product, and plan to spend at least \$5,000.00 the present year to secure a suitable outlet in quantity for your product.

We are ready to start our selling campaign within a day or two after you sign both copies of this letter, one for our files and one for yourself, which we will accept as a contract."

For the purpose of showing that under the terms of this contract defendant was not obligated to pay a minimum

plaintiff and against defendant for the balance amounting to \$380.37. That judgment & defendant's failure to reverse by this appeal. As the contents of the parties require a construction and interpretation of the writing, we set it up verbatim. It is in the form of a letter by the defendant to the plaintiff, dated May 1, 1930, which was received by the plaintiff on May 1, 1930, and accepted by him:

"This is to certify that we have made with you, Mr. George Kline, an agreement to have the exclusive selling and advertising rights on your line of sewer pipes during the life of your present patents, or any future patents that you may have on these articles. After January 1, 1930, we are obligated to pay you a minimum royalty of \$5.00 per month, or our contract is subject to cancellation. This contract cannot be cancelled unless we receive six months' notice in writing. For as to the use of your name on the right sewer pipe and the 'T' sewer pipe, without any expense to us, but we are to maintain them in good working condition at our own expense. We are to use our line of the 'T' sewer pipe, without any expense to you. In case you cancel this contract, under the provisions above named, you are to pay us \$50.00 for our time and any stock that we may have on hand. We are to pay you a royalty of 10% of the amount of our sales of sewer pipes. This royalty is payable on the last of the month for all sales of the previous calendar month. You are to have the privilege of exercising over our sales records at any time that you so wish, in order to satisfy yourself of the correctness of our royalty payments. We are to give you the privilege of having sewer pipes from us for retail sale from your place at all times, on the basis of our best factory prices. We are to maintain our present stock of right sewer pipes, as our business develops, at a price of 35¢ each, and pay you for any extra that you have on hand, over and above the established sewer pipes, at our cost price. We are to purchase your 'S' sewer pipes, at a price of 50¢, at a price of 50¢. It is further understood that, in case you cancel this contract, you are obligated to take not in excess of 1,000 sewer pipes from us at a price of 50¢ on the 'S', and 50¢ on the 'T'. We agree to spend \$500.00 in the next six months for advertising and promotion of your product, and plan to spend at least \$1,000.00 the present year to secure a suitable outlet in quantity for your product. We are ready to start our selling campaign within a day or two after you sign both sides of this letter, one for our time and one for yourself, which we will accept as a contract."

on the subject of signing this under the terms of this contract defendant was not obligated to pay a minimum

royalty, defendant offered in evidence correspondence between the parties prior to May 8, 1929. Upon objection by plaintiff the court excluded these letters upon the ground that the entire contract was contained in the writing of May 8, 1929, and that it could not be varied by correspondence of the parties prior to that date and pending the negotiations between them for a contract. Defendant contends that these letters were admissible upon the theory that the clause of the contract of May 8th with respect to the minimum royalty was ambiguous, and cites to this point Fuchs & Lang Mfg. Co. v. Kittridge, 146 Ill. App. 350; Baltine Chemical Co. v. Zulfer, 152 Ill. App. 308; C. B. & Q. Ry. v. Bartlett, 120 Ill. 603, and Conway v. City of Chicago, 274 Ill. 369.

There are two reasons, we think, why this contention cannot avail. In the first place, the writing is not ambiguous. It states distinctly that after January 1, 1930, defendant is "obligated to pay you a minimum royalty of \$50.00 per month." There is no ambiguity either patent or latent in this statement. The obligation therein assumed is clear and definite, and we can not conceive of any evidence of the prior negotiations which could throw further light upon the intention of the parties to determine which, of course, is the ultimate object in the construction of every contract. In the second place, this prior correspondence was offered in evidence as bearing upon the issues under defendant's claim of offset. We have read the same and find that even if admitted in evidence it would not in any way tend to change the plain meaning of the clause in question. This correspondence clearly shows that the question of whether a minimum royalty should be paid was thoroughly considered by the parties, one insisting that the contract should provide for such minimum payment and the other insisting that it should not contain such provision. There is no claim that the provision was inserted by reason of any fraud

royalty, defendant offered in evidence correspondence between the parties prior to May 8, 1936. Upon objection by plaintiff the court excluded these letters upon the ground that the entire contract was contained in the writing of May 8, 1936, and that it could not be varied by circumstances of the parties prior to that date and pending the negotiations between them for a contract. The defendant contends that these letters were admissible upon the theory that the clause of the contract of May 8th with respect to the minimum royalty was ambiguous, and that by their coming there was a rescission, see Ill. App. 200; Ruffalo Chemical Co. v. Zell, 188 Ill. App. 308; Ill. App. 200; Ruffalo Chemical Co. v. Zell, 188 Ill. App. 308; Ill. App. 200; Ruffalo Chemical Co. v. Zell, 188 Ill. App. 308.

There are two reasons, we think, why this contention cannot avail. In the first place, the writing is not ambiguous. It states distinctly that after January 1, 1936, defendant is "obligated to pay you a minimum royalty of \$8.00 per month." There is no ambiguity either patent or latent in this statement. The obligation therein assumed is clear and definite, and we can not conceive of any evidence to the prior negotiations which could throw light upon the intention of the parties to determine with, of course, in the ultimate effect in the construction of every contract. In the second place, this prior correspondence was offered in evidence as bearing upon the issue under defendant's state of mind. We have read the same and find that even if admitted in evidence it would not in any way tend to change the plain meaning of the clause in question. This correspondence clearly shows that the question of whether a minimum royalty should be paid was thoroughly considered by the parties, and insisting that the contract should provide for such minimum payment and the other insisting that it should not contain such provision. There is no claim that the provision was inserted by reason of any fraud

or mistake, and we hold defendant is bound thereby and that the court did not err in excluding evidence as against plaintiff's claim. Adams v. Eisenstein, 248 Ill. App. 559; Harmony Cafeteria Co. v. International Supply Co., 249 Ill. App. 532; Zalapi v. Holcomb & Hoke Mfg. Co., 241 Ill. App. 102; Salle v. Boas, 327 Ill. 145; Sterling Midland Coal Co. v. Great Lakes Coal & Coke Co., 334 Ill. 281.

Defendant also contends that the true construction of the contract is that if the amount of royalty did not reach the sum of \$50 a month, plaintiff could cancel the contract, but that he was not to have the benefit of a "cumulating chose in action," and insists that the contract should be so construed. A large number of cases such as Chicago Flour Co. v. Chicago, 243 Ill. 268, are cited, stating the general rule that the object of construction is to arrive at the intention of the parties and that the interpretation put upon the contract by the parties themselves, either contemporaneously or in its performance, may be considered for the purpose of ascertaining and determining that intention and that extrinsic evidence is admissible for such purpose. There is no question about these rules of law, but as before stated such evidence cannot avail against a clear and unambiguous provision in a written contract.

Defendant also contends that plaintiff is not entitled to recover because there is evidence tending to show that plaintiff failed to comply with certain conditions precedent on his part to be performed and because he is in default on the terms of his contract. An examination of the contract, however, fails to disclose any such conditions precedent, and the findings of the trial Judge in plaintiff's favor on the issues of fact are entitled to the same weight as the verdict of a jury. Marble v. Estate of Marble,

or mistake, and we hold defendant is bound thereby and that the
court did not err in excluding evidence as against plaintiff's
claim. Adams v. Associated, 243 Ill. App. 500; Adams v. Associated
Co., v. International Brotherhood, 240 Ill. App. 537; Adams v.
Adams & Sons, 241 Ill. App. 100; Adams v. Adams, 237 Ill.
145; Adams v. Adams, 241 Ill. App. 100; Adams v. Adams, 241 Ill.
234 Ill. 581.

Defendant also contends that the true construction of
the contract is that it is the amount of royalty due not less than
one of \$50 a month, plaintiff's claim would be correct, but that
he was not to have the benefit of a "contingent clause in relation"
and insists that the contract should be so construed. A large
number of cases such as Chicago Iron Co. v. Chicago, 243 Ill. 50
are cited, stating the general rule that the object of construction
is to arrive at the intention of the parties and that the interpre-
tation has upon the contract by the parties themselves, either
contemporaneously or in its performance, may be considered for the
purpose of ascertaining and determining that intention and that
extrinsic evidence is admissible for such purpose. There is no
question about these rules of law, but as before stated such evi-
dence cannot avail against a clear and unambiguous provision in
a written contract.

Defendant also contends that plaintiff is not entitled
to recover because there is evidence tending to show that plaintiff
failed to comply with certain conditions precedent on his part to
be performed and because he is in default on the terms of his con-
tract. In construction of the contract, however, failure to disclose
any such conditions precedent, and the findings of the trial judge
in plaintiff's favor on the issues of fact are entitled to the
same weight as the verdict of a jury. Wells v. Wells, 241 Ill.

304 Ill. 229; Hart v. Wilson, 177 Ill. App. 510; Moore v. Malloy Co., 222 Ill. App. 295.

It is further urged by defendant that the contract is void and unenforceable for want of mutuality. Young v. Farwell, 146 Ill. 466, and Vogel v. Pekoc, 157 Ill. 339, are cited. The contract as made is not subject to this objection, but if it were the performance thereunder by the parties as shown by the evidence would have prevented the successful interposition of the supposed defense. Fred Allen Auto Supply Co. v. John-Manville, 211 Ill. App. 217.

Plaintiff contends that as the motion for a new trial is not contained in the bill of exceptions, it is not properly before this court, and cites The People v. Ross, 243 Ill. App. 427, and Blackstone Shop v. Ashman, 250 Ill. App. 401. As the trial was by the court without a jury this question is unimportant, in this case. Climax Tag Co. v. American Tag Co., 234 Ill. 179.

There is no reversible error in the record, and the judgment is affirmed.

AFFIRMED.

O'Connor, P. J., and McSurely, J., concur.

35628

WILLIAM DAVID ZIMMERMAN,
Defendant in Error,

vs.

FEDERAL LIFE INSURANCE COMPANY,
a Corporation,
Plaintiff in Error.

64 7
ERROR TO MUNICIPAL COURT
OF CHICAGO.

265 I.A. 605⁴

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

The writ was sued out of this court by defendant to reverse a judgment of \$1000 entered by default for want of an affidavit of merits on July 6, 1931, in an action brought by plaintiff on a life insurance policy. The summons in the case was returnable June 22, 1931. Defendant duly filed its appearance on June 19th and on July 1st, prior to the entry of the judgment, filed its affidavit of merits, which appears in the record and which set up facts that, if true, would have precluded recovery on the part of plaintiff. It was, of course, error for the trial court to enter a judgment by default under such circumstances. The judgment was apparently entered through inadvertence, which came about in this way:

Rule 1 of the Municipal court provides:

"All cases brought in this court shall be given a number. In filing any papers or calling the attention of the court to any case the number must be given."

Defendant had been sued in two cases, which were pending against it at this time. One of these cases was entitled Durnian v. Federal Life Insurance Co., and to that case, pursuant to the rule, the number "2751852" was given. The other case (this one) was entitled Zimmerman v. Federal Life Insurance Co., to which the number "2084271" was given. An affidavit of merits for each of these cases was prepared in the office of the attorney for defendant at the same time, and, apparently by mistake of the stenographer, the number of the Durnian case was written on the affidavit of merits prepared

WILLIAM DAVID LEBERMAN,
Defendant in Error,

vs.

FEDERAL LIFE INSURANCE COMPANY,
a Corporation,
Plaintiff in Error.

ORDER TO MUNICIPAL COURT
OF CHICAGO.

265 I.A. 605

MR. JUSTICE KATZMANN DELIVERED THE DECISION OF THE COURT.

The writ was used out of this court by defendant to reverse a judgment of \$1000 entered by defendant for want of an affidavit of merits on July 4, 1931, in an action brought by plaintiff on a life insurance policy. The answer in the case was returnable June 22, 1931. Defendant duly filed his answer on June 1931 and on July 1st, prior to the entry of the judgment, filed the affidavit of merits, which appears in the record and which set up facts that, if true, would have precluded recovery on the part of plaintiff. It was, of course, error for the trial court to enter a judgment by default under such circumstances. The judgment was apparently entered through inadvertence, which came about in this way:

Rule 1 of the Municipal Court provides:

"All cases brought in this court shall be given a number. In filing any papers or calling the attention of the court to any case the number must be given."

Defendant had been sued in two cases, which were pending

against it at this time. One of these cases was entitled Leberman

v. Federal Life Insurance Co., and the other case, pursuant to the

rule, the number "275271" was given. The other case (this one) was

entitled Leberman v. Federal Life Insurance Co., to which the num-

ber "265271" was given. An affidavit of merits for each of these

cases was prepared in the office of the attorney for defendant at the

same time, and, apparently by mistake of the stenographer, the number

of the Burton case was written on the affidavit of merits prepared

and entitled as the Zimmerman case. When this affidavit of merits in the Zimmerman case was filed with the clerk of the court, the clerk did not detect the error, and instead of placing the affidavit in the files of the Zimmerman case, he placed it in the files of the Durnian case. The clerk and the court were thus misled into believing that defendant had defaulted in filing an affidavit of merits within the time required.

Rule 1 of the Municipal court seems to be primarily directed to the clerk of the court. The clerk, we have no doubt, would have the right to insist that the affidavit of merits, or any other paper presented for filing, should have the correct court number placed thereon before filing. He did not so insist here, and the mere fact that the wrong court number appeared on the affidavit of merits did not give to the clerk the right to file it in a case other than that in which it was entitled. The court number is not an essential part of the title of the suit at law, and the Practice act does not in any of its provisions require that suits should be numbered. Defendant was therefore not in default when the judgment was entered, and it was error for the court to enter the judgment order, because the affidavit of merits was duly filed when it was received by and deposited with the clerk. 25 Corpus Juris 1126; Golden v. McKim, 25 Nev. 350; 204 Pac. 602; Manhattan Co. v. Laimbeer, 108 N. Y. 578, 15 N. E. 712.

The clerk of the Municipal court has incorporated the original affidavit of merits in the record of this case. It is stamped "Filed 1931--July 1, P. M. 2:49, the Municipal Court of Chicago..... Clerk." Someone (and defendant's brief says he was unknown to defendant) has changed the number so that the correct number now appears thereon instead of the incorrect one. As this writ of error requires a search of the whole record, irrespective of

and entitled as the Shannon case. When this affidavit of service in the Shannon case was filed with the clerk of the court, the clerk did not detect the error, and instead of signing the affidavit in the file of the Shannon case, he placed it in the file of the Shannon case. The clerk and the court were both misled believing that Shannon had submitted in filing an affidavit of service within the time required.

While I at the Shannon court seem to be primarily responsible for the clerk of the court. The clerk, we have no doubt, would have the right to insist that the affidavit of service, or any other paper presented for filing, should have the correct court number placed thereon before filing. He did not so insist here, and the were fact that the wrong court number appeared on the affidavit of service did not give to the clerk the right to file it in a case other than that in which it was submitted. The court number is not an essential part of the title of the writ at law, and the transaction set does not in any of its provisions require that such title should be numbered. Defendants are responsible not in default when the judgment was entered, and it was error for the court to enter the judgment other, because the affidavit of service was only filed in the case received by and recorded with the clerk. Shannon v. Shannon, 200 Ill. 200; 200 Ill. 200; 200 Ill. 200.

The clerk of the Shannon court has incorporated the title and affidavit of service in the record of this case. It is stamped "Filed 1911-Jan 1, 7. 11:45, the Shannon Court of Chicago.....". "Clerk". Someone (and defendant's first wife he was known to as defendant) has changed the number so that the correct number now appears on the bottom of the instrument and. As this list of errors requires a search of the whole record, irrespective of

other and further proceedings, we are required on the record to hold the entry of the judgment was erroneous.

The record, however, further shows that on August 10th defendant filed a petition before the Judge who entered this judgment by default, setting up the facts above recited and attaching thereto and making a part thereof the affidavit of merits which had been filed and which we think discloses a meritorious defense to the action brought. The petition prayed that other counsel should be given leave to join as attorneys for defendant; that the order which had been entered on August 7th overruling a motion of defendant to vacate the default and judgment should be set aside, and that the order of default, as well as the order of judgment, both entered on July 6, 1931, should be vacated, and that leave should be given defendant to amend the affidavit of merits formerly filed by changing the number thereon to the proper court number. The court at first refused permission to file this petition, but thereafter by stipulation of the parties it was agreed that the record might show that the petition was filed August 10, 1931, and that the prayer of the petition was denied.

As more than thirty days had elapsed at that time, it is apparent that the proceeding was under section 20 $\frac{1}{2}$ of the Municipal court act (Smith-Hurd's Ill. Rev. Stats. 1931, par. 471, p. 971 $\frac{1}{2}$) which provides in substance that a final judgment, order or decree of the court may be vacated, set aside or modified on motion within thirty days after the entry of the same, and that "if no motion to vacate, set aside or modify any such agreement, order or decree shall be entered within thirty days after the entry of such judgment, order or decree, the same shall not be vacated, set aside or modified excepting upon appeal or writ of error, or by a bill in equity or by a petition to said Municipal court setting forth grounds for vacating, setting aside or modifying the same, which would be

other and further proceedings, we are required in the record to hold the entry of the judgment as erroneous.

The record, however, further shows that on August 10th

defendant filed a petition before the judge who entered this judgment by himself, setting up the facts above recited and attaching

thereto and making a part thereof the affidavits of certain witnesses and sworn affidavits which we shall discuss in a subsequent defense

to the action brought. The petition prayed that certain counsel

should be given leave to take an affidavit for defendant; that the

order which had been entered on August 7th setting aside a portion of defendant's verdict and judgment should be set aside,

and that the order of default, as well as the order of judgment,

both entered on July 6, 1901, should be vacated, and that leave

should be given defendant to amend the affidavit of service formerly

filed by attaching the number known to the proper courtmaster.

The court of first instance was asked to file this petition, but

thereafter by stipulation of the parties it was agreed that the

record should show that the petition was filed August 10, 1901, and

that the copy of the petition was correct.

As more than thirty days had elapsed at that time, it is

agreed that the proceedings were taken within thirty days of the expiration

of the term (which under the act, Nov. 21, 1901, was July 6, 1901).

When provided in substance that a final judgment, order or decree of the court may be vacated, set aside or modified on motion within

thirty days after the entry of the same, and that if no motion to

vacate, set aside or modify any such judgment, order or decree shall be entered within thirty days after the entry of such judgment, order

or decree, the same shall not be vacated, set aside or modified on

motion upon request or writ of error, or by a bill in equity or by

a petition to set aside or modify any such judgment, order or decree

vacated, setting aside or modifying the same, which would be

sufficient to cause the same to be vacated, set aside or modified by a bill in equity; provided, however, that all errors in fact in the proceedings in such case, which might have been corrected at common law by the writ of error coram nobis may be corrected by motion, or the judgment may be set aside, in the manner provided by law for similar cases in the Circuit Court." As we read this statute, a final judgment of the Municipal court after thirty days from its entry may be vacated, set aside or modified (1) upon appeal or writ of error, (2) by a bill in equity, (3) by a petition to the Municipal court which would be sufficient to cause the same to be vacated, set aside or modified by a bill in equity, and (4) by a motion in the nature of a writ of coram nobis as provided for under section 89 of the Practice act.

Plaintiff contends that this petition filed on August 10th is not before this court and that we may not consider it for the reason that it is not preserved by a bill of exceptions, or its equivalent, and cites a large number of cases which correctly hold that affidavits, motions, etc., are not a part of the record unless so preserved. The petition was here filed pursuant to section 204 and was therefore in the nature of a pleading which is a part of the record, although not incorporated in the bill of exceptions, whether we regard the same as a petition in the nature of a bill in equity or a proceeding brought under section 89 of the Practice act. In either case it is a part of the record because it is a pleading in what amounts to a new suit. We have expressly so held in Welley v. Klein, 257 Ill. App. 171, and it is unnecessary to repeat what was there said. Since the filing of the petition was the beginning of a new suit, it was not necessary for defendant to except to the order of the court denying its motion on August 10, 1931. We deem it entirely unnecessary to discuss the case on its merits. We have

entirely to cause the same to be vacated, set aside or modified by a bill in equity; provided, however, that all errors in fact in the proceedings in such cases, which might have been corrected as of course law by the writ of error quod habet may be corrected by motion, or the judgment may be set aside, in the manner provided by law for similar cases in the Circuit Court." As we read this statute, a final judgment of the Circuit Court after thirty days from its entry may be vacated, set aside or modified (1) upon appeal or writ of error, (2) by a bill in equity, (3) by a petition to the Circuit Court which would be sufficient to cause the same to be vacated, set aside or modified by a bill in equity, and (4) by a motion in the nature of a writ of error quod habet as provided for under section 36 of the Practice Act.

Plainly, therefore, that this petition filed on August 10th is not before this court and that we may not consider it for the reason that it is not preserved by a bill of exceptions, or its equivalent, and after a large number of cases which correctly state that affidavits, motions, etc., are not a part of the record unless preserved. The petition was here filed pursuant to section 36 and was therefore not a part of a preserved record as a part of the record, although not included in the bill of exceptions, whether or not the case was a petition in the nature of a bill in equity or a proceeding quod habet under section 36 of the Practice Act. In either case it is a part of the record because it is a pleading in that manner to a new writ. We have expressly so held in Relay v. Relay, 220 Ill. App. 17, and it is undoubtedly so held that was there said. About the filing of the petition was the making of a new writ, it was not necessary for defendant to execute the writ at the court having its notice on August 10, 1922. We have it entirely unnecessary to discuss the case on its merits. We have

uniformly granted relief where a petition has been filed disclosing facts and circumstances such as appear here. Inzi v. Lalongo, 248 Ill. App. 90; Risedorf v. Fyfe, 250 Ill. App. 122; Toth v. Samuel Phillipson & Co., 250 Ill. App. 247; McGrath & Swanson Construction Co. v. Chicago Ry. Co., 252 Ill. App. 475; Martin v. Starr, 255 Ill. App. 189, are a few of the many cases which might be cited.

For the reasons indicated the order of August 10th, as well as the judgment of July 6, 1931, will be reversed and the cause remanded for a trial upon the merits.

REVERSED AND REMANDED.

O'Connor, P. J., and McSurely, J., concur.

35653

LOUIS BRECKA,
Appellee,

v.

ABRAM SHATZ,
Appellant.

657
APPEAL FROM MUNICIPAL

COURT OF CHICAGO.

265 I.A. 606

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

Plaintiff filed an affidavit in the usual form for the replevin of certain personal property described and located at 3167 Elston avenue, Chicago. The property consisted of certain articles, such as motion picture projecting machines, portable electric fans, amplifiers, seats, ushers' uniforms, etc., used in conducting a theater at the place above mentioned. The writ issued and was served on Abram Shatz, defendant, who gave a forthcoming bond in the sum of \$6,000 and retained possession of the property. Thereafter, he filed pleas stating that he did not take or retain the property; that the seats were a part of the real estate and that as lessor by virtue of a lease he had a lien upon all the property for rent, which was then due and unpaid; that the lessee, the Elston Theatre Corporation, was the owner of all the property, and that defendant had filed a bill in equity in the Circuit court to foreclose his lien under the lease. There was a trial by the court and at the conclusion of all the evidence defendant moved to find the issues in his favor. The motion was overruled, and the court found the issues in favor of plaintiff, assessed damages in his favor to the amount of one cent and costs and overruling defendant's motion for a new trial, entered judgment on its finding of property in plaintiff and for the amount of damages as assessed. By this

LOUIS WENZEL,
Appellant,

v.

ALAN SMITH,
Appellant.

ALAN SMITH, Appellant,

vs.

265 I.A. 606

THE JUDICIAL MATHEMATICS INSTITUTE OF THE COURT.

Plaintiff filed an affidavit in the usual form for the

recovery of certain personal property described and located at

1215 Madison Avenue, Chicago. The property consisted of certain

articles, such as motor vehicle repairing machines, portable

electric fans, amplifiers, radios, cameras, etc., used in

conducting a lecture at the place above mentioned. The writ

issued and was served on Dean Smith, defendant, who gave a return

coming bond in the sum of \$5,000 and retained possession of the

property. Thereafter, he filed a plea stating that he did not

take or retain the property; that the items were a part of the real

estate and that as lessor by virtue of a lease he had a lien upon all

the property for rent, which was then due and unpaid; that the lease,

the Madison Theatre Corporation, was the owner of all the property.

and said defendant had filed a bill in equity in the Circuit Court to

foreclose his lien under the lease. There was a trial by the court

and at the conclusion of all the evidence defendant moved to find the

liens in his favor. The motion was overruled, and the court

found the liens in favor of plaintiff, assessed damages in his

favor to the amount of one year and costs and overruled defendant's

motion for a new trial, entered judgment on its finding of property

in plaintiff and for the amount of damages assessed. By this

appeal defendant seeks to reverse this judgment.

Defendant in his brief cites sections 1 and 2 of the Replevin act (Smith-Hurd's Ill. Rev. Stats., chap. 119, p. 2369) and he cites but one case, Robinson v. Muschle. The case is incorrectly cited as being reported at 223 Ill. App. 519, whereas it is found at 233 Ill. App. 519. The case follows the ancient and well-known rule that a plaintiff in replevin may recover only on the strength of his own title, and that it is not necessary to determine whether the defendant has right, title and interest.

The evidence shows without dispute that plaintiff is president of the Elston Theatre Corporation and that this corporation is the lessee of defendant Shatz; that under a claim that there was a default in the payment of rent, defendant took possession of the theatre and of the property which is in controversy. The record has been imperfectly abstracted, and an examination of it shows that there is evidence from which the court could reasonably find that plaintiff personally purchased all the articles named in the complaint and in the affidavit for replevin and paid for them out of his personal funds. Defendant offered no evidence to the contrary. There is evidence tending to show that the rent was not promptly paid when due, but there is no evidence tending to show that defendant issued or levied a distress warrant as in such case he would have a legal right to do. The evidence for plaintiff is prima facie sufficient to establish his right of ownership and possession and that defendant is wrongfully withholding his property from him.

The judgment of the trial court will therefore be affirmed.

AFFIRMED.

O'Connor, P. J., and McSurely, J., concur.

appeal defendant seeks to reverse this judgment.

Defendant in his brief cites sections 1 and 2 of the

Replevin act (Mich.-Stat. 1911, Rev. Code, chap. 119, § 2353)

and he cites two cases, Robinson v. Roberts. The case in

incorrectly cited as being reported at 111 Ill. App. 517, whereas

it is found at 113 Ill. App. 517. The case follows the meaning

and well-known rule that a plaintiff in replevin may recover only

in the strength of his own title, and that it is not necessary to

ascertain whether the defendant has title, title and interest.

The evidence shows without dispute that plaintiff is

president of the Ligon Theatre Corporation and that this corporation

is the owner of defendant's theatre; that under a claim that there was

a default in the payment of rent, defendant took possession of the

theatre and of the property which is in controversy. The record

has been imperfectly abstracted, and an examination of it shows

that there is evidence from which the court could reasonably find

that plaintiff lawfully possessed all the articles named in the

complaint and in the affidavit for replevin and paid for them out of

his personal funds. Defendant offered no evidence to the contrary.

There is evidence tending to show that the rent was not properly paid

when due, but there is no evidence tending to show that defendant

acted or acted in a dishonest manner as in such case he would have a

legal right to do. The evidence for plaintiff is prima facie sufficient

to establish his right of ownership and possession and that defendant

is wrongfully withholding his property from him.

The judgment of the trial court will therefore be affirmed.

ATTORNEYS.

Chicago, Ill., and Newberry, Ill., counsel.

35666

R. W. GRAHAM et al.,
Appellees,

vs.

MORRIS FELDMAN et al.,
Appellants.

66
7
APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

265 I.A. 606²

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This litigation concerns the right of property and possession of an Elcar automobile, model 120, serial number A7Y50, motor number 25274. The record shows that on June 24, 1931, W. A. Sammons, as agent for plaintiffs, filed an affidavit of replevin in the usual form, alleging that Morris Feldman, John Doe, et al., unlawfully took the automobile on that date. The writ issued on the same day returnable on June 30, 1931, and was returned by the bailiff that he had replevined the property and delivered the same to plaintiffs and served the writ on defendants, Morris Feldman, doing business as Feldman's Service Station, and also on John Doe by delivering a copy to Clem Fogge. On June 30, 1931, Jennie, Nathan R., David I., and Abraham Feldman, executors and trustees under the will of Morris Feldman, and Nathan R., David I., and Abraham Feldman, copartners trading as M. Feldman & Sons, entered their appearance as defendants. On their motion plaintiffs were ordered to file a bill of particulars, and they complied July 22, 1931.

The bill of particulars alleged that on February 23, 1931, Cook, Samuels, Correll Co., a corporation, as vendor, executed a conditional sales agreement with one Marcus, vendee, for the sale of said car, it being provided, however, that the title should remain in the vendor; that the XCommercial Acceptance Company, a corporation, purchased this sales agreement and a note of Marcus, which was given and delivered with the same; that Marcus defaulted on the contract and thereafter unjustly detained the automobile. There was a trial

U. S. DEPARTMENT OF JUSTICE
OFFICE OF THE ATTORNEY GENERAL

VS.

JOHN J. HARRIS et al.
Appellants.

U. S. DEPARTMENT OF JUSTICE

OFFICE OF THE ATTORNEY GENERAL

35000 I. A. 600

U. S. DEPARTMENT OF JUSTICE OFFICE OF THE ATTORNEY GENERAL

This litigation involves the right of property and possession of an automobile, motor car, serial number 85374, and motor car number 85374. The record shows that on June 24, 1931, W. A. Garrison, as agent for appellants, filed an affidavit of ownership in the usual form, alleging that motor car, John Doe, et al., was actually taken from the appellee on that date. The title passed on the same day returnable on June 24, 1931, and was returned by the appellee that he had received the property and delivered the same to appellants and served the title on appellants, John Doe, et al., as before business as appellants' service station, and also on John Doe by delivering a copy to John Doe. On June 24, 1931, appellee Nathan R., David I., and Abraham Leibman, executors and trustees under the will of Joseph Leibman, and Nathan R., David I., and Abraham Leibman, co-defendants trading as J. Leibman & Sons, entered their appearance as defendants. On their motion appellants were ordered to file a bill of particulars, and they complied July 21, 1931. The bill of particulars alleged that on February 23, 1931, Cook, Samuel, et al., a corporation, as vendor, executed a conditional sales agreement with one Harris, vendee, for the sale of said car, if said agreement, however, that the title should remain in the vendor; that the conditional sales agreement was given pursuant to this sales agreement and a note of Harris, which was given and delivered with the same; that Harris defaulted on the contract and thereafter negligently damaged the automobile. There was a trial

by the court and a finding that the right of possession was in plaintiff and damages were assessed at one cent with judgment for the damages and for possession of the property.

The principal contention of the defendants is that the evidence fails to disclose any demand was made for the automobile prior to suing out the replevin writ, and it is urged that the judgment should be reversed for that reason. It is said that the possession of the automobile was initially lawful and that a demand in such case is necessary before bringing suit. A number of cases are cited holding that where a party obtains possession of property lawfully an action of replevin cannot be maintained until a demand has been made and the possession refused, and we understand that general rule of law is not questioned. Like all general rules, however, this rule has its exceptions, and cases are cited by plaintiff which hold that where the circumstances show that a demand would have been unavailing such demand is not necessary. Such is the rule announced in Kee & Chapell Co., v. Pennsylvania Co., 291 Ill. 248, where Johnson v. Howe, 2 Gilm. 342, and Granz v. Kroger, 22 Ill. 74, are cited as authority.

The conditional contract which is in evidence was made at Elkhart, Indiana, and it provides that the purchaser shall not remove or attempt to remove the car from the county and state where the sale was made without the written consent of the seller, and that the purchaser shall not sell the car or any interest therein. There is proof that the purchaser never made any payment at all upon the contract, and the property was found in Chicago, Illinois, outside the state where the conditional sales agreement was made, and in the possession of defendants. It is apparent that since the automobile was not in the possession of the vendee, any demand upon him would have been entirely unavailing, as he would

by the test and a finding that the right of possession was in
Albion and changes were made in the same with the intent
for the same and for possession of the same.

The principal contention of the defendant is that the

evidence fails to disclose any fraud was made for the purpose of

either to bring out the property with, and it is said that the

defendant should be removed for that reason. It is said that the

possession of the property was initially taken and that a de-

mand in such case is necessary before bringing suit. A number of

cases are cited holding that where a party obtains possession of

property lawfully an action of replevin cannot be maintained

until a demand has been made and the possession returned, and no

interest in that property is to be lost. The defendant, like all

General rules, however, this rule has its exceptions, and cases

are cited by Albion which hold that where the circumstances

show that a demand would have been unavailing upon demand it is not

necessary. Such is the rule announced in See Campbell, Co. v.

Springfield Co., 201 Ill. 444, 70 N.E. 2d 1111, 1112.

342, and People v. People, 22 Ill. 71, are cited as authority.

The conditional contract which is in evidence was made

at Albion, Illinois, and it provides that the purchaser shall

not remove or attempt to remove the car from the country and drive

where the car was made without the written consent of the seller.

and that the purchaser shall not sell the car or any interest

therein. There is proof that the purchaser never made any payment

at all upon the car itself, and no property was found in Chicago,

Illinois, outside the state where the conditional sales agreement

was made, and in the possession of defendant. It is apparent that

since the motorcycle was not in the possession of the vendee, any

demand upon him would have been entirely unavailing, as he would

have been unable to deliver that which he did not possess. Defendants offered no proof whatever upon the trial. Defendants' rights on this record are not superior to the rights of Marcus. Sherer-Gillett Co. v. Long, 318 Ill. 432; Sherer-Gillett Co. v. Long, 236 Ill. App. 162; Dayton Scale Co. v. General Market House Co., 248 Ill. App. 279, 14. 335 Ill. 342. Under the circumstances disclosed there is no presumption that the automobile came into the possession of defendants unlawfully. We therefore hold no demand was necessary.

Defendants also urge on the authority of Glow v. Gilbert, 54 Ill. App. 134, and Evans v. Heyton, 85 Ill. 579, that jurisdiction of a court in a replevin case depends on an affidavit being filed in compliance with the statute, and it is urged that such affidavit was not originally filed in this case. It appears from the record that an order was entered upon the trial upon motion of plaintiffs, giving them leave to amend all papers on their face, and that defendants excepted to the entry of that order. The affidavit in the record does not appear to be defective, and apparently the complaint of defendants concerns this order. The order, however, was not improper. Frink v. Flanagan, 1 Gilm. 35; Kirkpatrick v. Cooper, 77 Ill. 565. Moreover, the question does not seem to have been preserved for review in this court by bill of exceptions. The further contention of defendants that a new plaintiff was erroneously substituted for the original plaintiff, to which they cite Zukowski v. Armour & Co., 107 Ill. App. 663 (which seems to be contrary to the later case of Redlowski v. Grossfeld & Roe Co., 192 Ill. App. 534) likewise was not preserved.

It is urged by defendants that the identity of the particular property was not proved, but we think this was established by the record. Baldwin v. Smith, 143 Ill. App. 56. No evidence whatever

have been unable to deliver that which he did not possess. Defendant's rights were affected no great whatever upon the trial. Defendant's rights on this record are not superior to the rights of others. Thayer v. Gillett Co. v. Bond, 113 Ill. 437; Thayer v. Gillett Co. v. Bond, 113 Ill. 438.

111. App. 182; Dayton v. Bond, 113 Ill. 437; Thayer v. Gillett Co. v. Bond, 113 Ill. 438. Under the circumstances discussed there is no presumption that the state will take into the possession of defendant lawfully. We therefore find no demand was necessary.

Defendant also was on the authority of State v. Hiffert, 54 Ill. App. 174, and State v. Hiffert, 8 Ill. 470, that the admission of a court in a previous case does not in itself being filed in accordance with the statute, and it is urged that such admission was not originally filed in this case. It appears from the record that an order was entered upon the trial upon motion of plaintiff, giving them leave to amend all papers on their trial, and that defendant objected to the entry of that order. The admission in the record does not appear to be defective, and apparently the complaint of defendant concerning this order. The order, however, was not improper. State v. Hiffert, 1 Ill. 35; Thayer v. Bond, 113 Ill. 437. Moreover, the question does not seem to have been preserved for review in this court by bill of exceptions. The further contention of defendant that a new plaintiff was erroneously substituted for the original plaintiff, to which they cite Thayer v. Bond, 107 Ill. App. 463 (which seems to be contrary to the later case of Thayer v. Bond, 113 Ill. App. 463) is also not preserved.

112 Ill. App. 463; Thayer v. Bond, 113 Ill. App. 463. It is urged by defendant that the identity of the particular property was not proved, but we think this was established by the record. Thayer v. Bond, 113 Ill. App. 463. No evidence whatever

was submitted by defendants, and the defenses which they seek to interpose seem to be purely technical. We think the evidence submitted by plaintiffs, while in some respects meager, is prima facie sufficient, and the judgment will therefore be affirmed.

AFFIRMED.

O'Connor, P. J., and McSurely, J., concur.

was admitted by defendant, and the defense which they seek to
 introduce seems to be merely speculative. We think the evidence
 admitted by plaintiff, while in some respects meager, is plain
and sufficient, and the judgment will therefore be affirmed.

APPROVED.

October, 7, 18, and November, 1, 1890.

35847

NANCY WASSMAN,
Appellee.

vs.

CHICAGO TITLE & TRUST COMPANY et al.,
Defendants.

On Appeal of EDWARD A. MILLER,
Appellant.

INTERLOCUTORY APPEAL FROM
SUPERIOR COURT OF COOK
COUNTY.

265 I.A. 606³

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

This is an appeal from an interlocutory order appointing a receiver in a foreclosure proceeding. The appeal is by Edward A. Miller, whom the order appointing the receiver describes as the owner of the equity of redemption. He was served with notice and appeared with his counsel, and the motion for receiver was continued to permit him to answer the bill. Instead of answering he demurred and the receiver was thereupon appointed. Miller first says that the receiver should not have been appointed merely because the trust deed pledges the rents and authorizes the appointment of a receiver, citing the recent cases of Frank v. Siegel, 263 Ill. App. 316, and Davis v. Blair, 252 Ill. App. 417; these cases so hold.

However, in the present verified bill are set forth other facts than those which were under consideration in the cases cited. These are, that the amount due on principal and interest amounted to \$5,150; that the general taxes on the property conveyed have not been paid for the years 1928 and 1929, and have been forfeited because of this; that special assessments on the property have not been paid, and that there have been forfeitures for this failure in the years 1930 and 1931; that the premises are a two-story brick building consisting of six rooms, which is vacant, with no one in possession; that there is danger unless someone is put in possession that the premises will be destroyed; that they are worth not to exceed \$5,000.

WASLEY FARMERS

Associates

vs.

CHICAGO TITLE & TRUST COMPANY OF ILL.
Defendants.

ON MOTION OF STEPHEN A. MILLER,
Respondent.

Set I.A. 606

THE JUSTICE COURTS DELIVERED THE VERDICT OF THE COURT.

This is an appeal from an interlocutory order appointing a

receiver in a foreclosure proceeding. The appeal is by Edward A.

Miller, upon the order appointing the receiver described in the order

of the equity of redemption. He was served with notice and appeared

with his counsel, and the motion for receiver was sustained in per-

mit to answer the bill. Instead of answering he demurred and the

receiver was thereupon appointed. Miller filed reply that the re-

ceiver should not have been appointed merely because the deed had

expired the trustee had not called for the appointment of a receiver.

citing the recent case of Trust v. Miller, 103 Ill. App. 615, and

Miller v. Miller, 103 Ill. App. 617; again as in Bois.

However, in the present verified bill it is not fairly stated

facts show that there was no objection to the order cited.

These are, that the amount due on the mortgage and interest amounted to

\$5,100; that the property conveyed have not

been paid for the years 1915 and 1916, and have been foreclosed and

cause of this; that unpaid assessments on the property have not been

paid, and that there have been foreclosures for this failure in the

years 1910 and 1911; that the premises are a ten-acre plot of land

consisting of six acres, which is vacant, with no one in possession;

that there is no other person in possession of the premises; that the

premises will be foreclosed; that they are worth not to exceed \$5,000.

These facts, together with the provisions of the trust deed conveying the rents and authorizing the appointment of a receiver, were sufficient to justify the appointment by the chancellor.

The next point is that the bill is defective in that it does not state that the original mortgagors, Grace G. Appling and her husband, owned the property in question when they executed the trust deed; neither is the interest of Edward A. Miller described in the bill. The original bill alleges that Edward A. Miller and his wife and Grace G. Appling and her husband have or claim to have some interest in the premises as purchasers or otherwise, but that such rights are subject to the lien of the complainant. This allegation as to Miller's interest is sufficient. If he is the owner of the property by purchase subsequent to the execution of the trust deed he should assert this by his answer. The allegations were sufficient in this respect to make out a prima facie case.

Rohrhorst v. Schmidt, 218 Ill. 585; Kehm v. Mott, 187 Ill. 519. The omission in the original bill to allege that the makers of the note and trust deed owned the premises at the time, is no reason why a receiver should not be appointed. The omission is at best merely technical and the bill might readily be amended in this respect. In fact this was done by an amended bill which alleged that at the time of the execution of the trust deed Grace G. Appling and her husband were the owners of the real estate in fee simple.

The receiver was properly appointed and the interlocutory order is affirmed.

AFFIRMED.

O'Connor, P. J., and Matchett, J., concur.

These facts, together with the provisions of the trust deed conveying the rents and authorizing the appointment of a receiver, were sufficient to justify the appointment by the court.

The next point is that the bill is defective in that it does not state that the original mortgage, where it applied and her husband, owned the property in question when they executed the trust deed; neither is the interest of Edward A. Miller described in the bill. The original bill alleged that Edward A. Miller and his wife and Grace W. Appleby and her husband have or claim to have some interest in the premises as purchasers or otherwise, but that such rights are subject to the lien of the mortgage. This allegation as to Miller's interest is sufficient, if he is the owner of the property by purchase subsequent to the execution of the trust deed he could assert this by his answer. The allegations were sufficient in this respect to raise out a prima facie case. Rehnold v. Rehnold, 218 Ill. 335; Rehnold v. Rehnold, 127 Ill. 212. The omission in the original bill to allege that the makers of the note and trust deed owned the premises at the time, is no reason why a receiver should not be appointed. The omission is at best merely technical and the bill might readily be amended in this respect. In fact this was done by an amended bill which alleged that at the time of the execution of the trust deed Grace W. Appleby and her husband were the owners of the real estate in the state. The receiver was properly appointed and the interlocutory order is affirmed.

APPROVED.

O'Connor, J. J., and Edwards, J., concur.

35828

LESLIE F. MUTER COMPANY, an
Illinois Corporation,
Appellee.

vs.

THE MUTER COMPANY, an Illinois
Corporation, LESLIE F. MUTER,
GLADYS NELSON MUTER, CHARLES
MUTER and ANNA MUTER,
Appellants.

INTERLOCUTORY APPEAL FROM
CIRCUIT COURT OF COOK COUNTY.

265 I.A. 606⁴

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This appeal is by defendants from an interlocutory order entered on November 23, 1931, whereby defendants until the further order of the court were enjoined from using the name "Muter" alone or with other words, as its corporate name in the advertising or sale of, or as a brand or trademark upon, radio parts or appurtenances similar to or imitating the radio parts or appurtenances being advertised or sold, or offered for sale, by complainant at the time of the filing of the bill of complaint.

The bill was filed May 16, 1931, was based on charges of unfair competition and waived answer under oath. It was duly verified. Two of the defendants were served by summons on May 18th and on the same day all the defendants filed their appearance and two days later, May 20th, answered under oath. On May 26th complainant filed a replication to the answer, and on the same day defendants by leave filed an amendment to their answer. On the same day complainant filed a motion for a temporary injunction, and an order was entered referring the motion "for a temporary injunction on the face of the bill of complaint" to a master. This order on May 29, 1931, was amended to the effect that the motion should be considered on the bill of complaint, the answer and the replication thereto. On June 22, 1931, at the request of the master this motion was set aside, and the motion was thereafter continued from

LEWIS & CLARK COMPANY, an
Illinois Corporation,
Applicant.

vs.

THE MOUNTAIN COMPANY, an Illinois
Corporation, LEWIS & CLARK
COMPANY, LEWIS & CLARK
COMPANY and LEWIS & CLARK
COMPANY.

IN THE CIRCUIT COURT OF THE COUNTY OF
ILLINOIS

265 I.A. 606

1. WHEREAS the following is the caption of the case:

This case is by defendant from an interlocutory order
entered on November 22, 1931, whereby defendant and the plaintiff
order of the court were entered from which the name "MOUNTAIN" alone
or with other words, as its corporate name in the operating ex-
ercise of, or as a brand or trademark name, in its name or otherwise
names similar to or imitating the trade name or trademarks
being advertised or sold, or offering for sale, by complaint as
the title of the bill of complaint.

The bill was filed May 10, 1931, and was based on charges of
unfair competition and unfair trade name. It was duly
verified. Two of the defendants were served by summons on May
10th and on the same day all the defendants filed their answers
and two days later, May 12th, answered under oath. On May 26th
complaintant filed a reply to the answer, and on the same day
defendants by leave filed an amendment to their answer. On the same
day complaintant filed a motion for a temporary injunction, and an
order was entered restraining the motion "for a temporary injunction
on the face of the bill of complaint" to a writ. This order on
May 27, 1931, was entered in the clerk's office and the motion should be
considered as the bill of complaint, the answer and the reply.
On June 22, 1931, at the request of the plaintiff this
motion was set aside, and the motion was thereafter continued from

time to time until November 23, when it was considered by the chancellor on the bill, the answer and the replication and the order appealed from entered.

The bill alleged in substance that complainant, Leslie F. Muter Company, was organized under the laws of Illinois October 20, 1921, by defendants; that the business was conducted by Leslie F. Muter, and that this business was the manufacturing, assembling and sale of radio parts and accessories; that the factory and offices of the Leslie F. Muter Company were located in Chicago; that the name "Muter" became the most prominent and best known part of the corporate name; that the advertising of the company emphasized the name "Muter"; that the printed matter, cartons, boxes and catalogues of the corporation had printed on them "Dependable Muter Products," the word "Muter" being printed in larger letters than the other words; that complainant had always used the word "Muter" as a trademark upon many of the products sold; that the word "Muter" had a well known meaning in the trade and was prominently and permanently stamped on certain of its products; that on an article known as "guardian approved lightning arrester" sold by it there was imprinted upon brown porcelain shell the words "Muter Co. Chicago," which was an abbreviation of "Leslie F. Muter Company, Chicago;" that similar words were imprinted on other products; that September 30, 1928, Leslie F. Muter and the other individual defendants sold all their stock in the complainant corporation to the Steinite Radio Company, a Delaware Corporation, for a large price, approximately \$900,000, and that by reason of the facts set forth defendants were estopped from using the name of "Muter Co." or any name containing the word "Muter," and from using the word "Muter" as a trademark; that notwithstanding the sale of the stock in the complainant company, Leslie F. Muter agreed to and did remain as president, director and manager of the company and entered into a

time to time until November 27, when it was transferred by the
 Chancellor on the bill, the answer and the petition and the
 order appeared from entered.

The bill alleged in substance that defendant, Leslie K.
 Water Company was organized under the laws of Illinois October 20,
 1901, by defendant; that the business was conducted by Leslie K.
 Water, and that this business was the manufacturing, assembling,
 and sale of radio parts and accessories; that the factory and of-
 fices of the Leslie K. Water Company were located in Chicago; that
 the name "Water" became the most prominent and best known part of
 the corporate name; that the advertising of the company emphasized
 the name "Water"; that the printed matter, cartons, boxes and oth-
 erwise of the corporation had printed on them "Defendant Water
 Products," the word "Water" being printed in larger letters than
 the other words; that complainant had always used the word "Water"
 as a trademark upon many of the products sold; that the word
 "Water" had a well known meaning in the trade and was prominently
 and permanently stamped on certain of its products; that on an
 article known as "Standard" having the word "Water" sold by it
 there was inscribed upon the front portion of the word "Water"
 Co., Chicago," which was an abbreviation of "Leslie K. Water Company,
 Chicago;" that similar words were inscribed on other products; that
 September 30, 1902, Leslie K. Water and the other individuals de-
 fendants sold all their stock in the complainant corporation to the
 defendant Leslie K. Water Corporation, for a large price,
 approximately \$200,000, and that by reason of the large sale of
 defendants were assigned from using the name of "Water Co." or any
 name containing the word "Water," and from using the word "Water"
 as a trademark; that notwithstanding the sale of the stock in the
 complainant company, Leslie K. Water agreed to and did remain as
 president, director and manager of the company and entered into a

contract of employment dated October 23, 1928, with the Steinite Radio Co. at a large salary; that he agreed to remain in the employ of the corporation until September 30, 1930, and during that time to devote as much of his time as he had been accustomed to do to the business and affairs of the corporation and not to, directly or indirectly, become associated with or in any way aid the business of any concern competing with the Steinite Radio Company or any of its subsidiaries.

The bill further alleged that shortly after the sale of the stock Leslie F. Muter conceived and began to carry out the wrongful, fraudulent and malicious plan of ruining the business of complainant and failed to give his best efforts and attention to complainant's business; that the business ceased to prosper and a receiver in bankruptcy was appointed; that the claims of the creditors were settled after about thirty days; that about eight months before Leslie F. Muter left complainant's employ (which he did in May, 1930) while he was still president, director and general manager of complainant, in violation of his contract dated October 23, 1928, and without the knowledge of complainant, he purchased all the stock of the Compo Manufacturing Company, a corporation organized under the laws of Illinois, on September 28, 1929, for the object of manufacturing, buying, selling and generally trading in machinery, electrical devices and apparatus, supplies and accessories, radio, television, telephone supplies and accessories; that the place of business of the Compo Mfg. Co. was in Chicago, Illinois, and on the south side of the city, as was the business of complainant; that Leslie F. Muter thereafter gave time and attention to the business and affairs of the Compo company and while employed by complainant became director and president of it in violation of the said contract, and that in October or November, 1930, caused the Compo Manufacturing Company to begin to imitate and duplicate items of merchandise which

contract of employment dated October 25, 1932, with the Steinrite Radio Co. as a large entity; that he agreed to remain in the employ of the corporation until September 3, 1935, and during that time to devote as much of his time as he had been authorized to do in the business and affairs of the corporation and not to, directly or indirectly, become associated with or in any way aid the business of any concern connected with the Steinrite Radio Company or any of its subsidiaries.

The bill further alleged that shortly after the sale of the Steinrite Radio Co., Kuter associated and began to carry out the business of the corporation and maintain the business of the corporation and failed to give his best efforts and attention to the corporation's business; that the business ceased to prosper and a receiver in bankruptcy was appointed; that the claims of the creditors were satisfied after about thirty days; that about eight months before Leslie F. Kuter left complainant's employ (which he did in May, 1935) while he was still president, director and general manager of complainant, in violation of his contract dated October 25, 1932, and without the knowledge of complainant, he purchased all the stock of the Corde Manufacturing Company, a corporation organized under the laws of Illinois, on September 3, 1935, for the object of manufacturing, buying, selling and generally trading in securities, electrical devices and apparatus, radios and accessories, radio, television, telephone supplies and accessories; that the place of business of the Corde Mfg. Co. was in Chicago, Illinois, and on the south side of the city, and was the business of complainant; that Leslie F. Kuter thereafter gave time and attention to the business and affairs of the Corde company and while employed by complainant became director and president of it in violation of the said contract, and that in October of November, 1935, when the Corde Manufacturing Company began to fail and disclose items of merchandise which

were then being manufactured and sold by complainant; that on or about November 20, 1930, Leslie F. procured from the office of the Secretary of State of Illinois a certificate changing the name of the Compo Manufacturing Company to "The Muter Company;" that Leslie F. has continuously been the president, manager and director of the Compo Manufacturing Company and that the other defendants, members of his family, became directors or stockholders of the corporation; that Leslie F. in conspiracy with the other individual defendants caused this name to be so changed, wilfully, fraudulently and wickedly, in order to confuse and mislead customers of complainant and the public and the trade generally into believing that The Muter Company was the same corporation as complainant, and in order to defraud complainant and appropriate its good name, good will, trademarks or brands and business; that defendants were succeeding in this fraudulent, wicked and wilful design and that many were misled into believing that The Muter Company was the same corporation as the complainant; that mail and telephone calls intended for defendant have reached and been delivered to complainant, and vice versa.

The bill also charges that the change of name was in violation of section 24 of the Corporation act of the State of Illinois; that pursuant to the fraudulent designs defendants had adopted or imitated the billheads, invoices and other printed matter of complainant; and has continued so to do; that shortly after changing its name and in pursuance of the fraudulent, wilful and wrongful design to defraud and deceive, defendants commenced the production and sale of radio parts and appurtenances, imitating the function, make-up, use and appearance of the goods being manufactured, assembled and sold by complainant and continued so to do; that in pursuance of the fraudulent and deceitful scheme defendant company has marked its radio parts and appurtenances "Muter

Chicago" or "The Muter Co. Chicago;" that defendant has been palming off its goods as those of complainant and will continue to do so to deceive its customers and the public; that defendant has filled orders intended for complainant and has used the catalogue pages of radio parts and appurtenances of complainant in filling orders from prospective customers with its own merchandise representing the same to be that described in the catalogues of complainant.

The bill averred that the trademark or brand "Muter" and "Muter Company" on radio parts and appurtenances became and was the sole property of complainant which the Muter Company has been fraudulently and wilfully appropriating and using; that complainant has in writing demanded defendants to cease and desist from these acts and things, but that defendants have refused to comply with the demand. The prayer of the bill is for a perpetual injunction and an accounting.

The joint and several answer of defendants admits the relationship of the defendants, the incorporation of the corporations, the location of the different businesses conducted by the parties, the sale of the stock of defendants in the Leslie F. Muter Company to the Steinite Radio Company; that the name "Muter" was an inseparable part of the corporate name and was known to the customers and buying public and trade generally; that the trademark of said corporation was the word "Muter" in a characteristic type in an oval with a spark protruding from the upper right hand and the lower left hand corner of the oval and the advertising slogan of the corporation was the words "Dependable Muter Products" in a characteristic style of type, with emphasis on the word "Muter;" that this trademark and this slogan were well and favorably known and that the trademark was stamped or affixed on certain described products.

The answer specifically denies that the words "Muter Co.

"Chicago" or "The Water Co. Chicago"; that defendant has been claiming off the words as marks of defendant and will continue to do so to deceive the customers and the public; that defendant has filed orders issued for copyright and has used the defendant's name of radio parts and accessories of defendant in all the orders from prospective customers and has also used the defendant's name in the same to be used elsewhere in the defendant's business.

The bill avers that the trademark of brand "Water" and "Water Company" on radio parts and accessories has been the sole property of defendant since the Water Company has been fraudulently and vitiously appropriating and using; that defendant has its writing attached defendant's name and dealer from these name and initials, but that defendant have refused to comply with the demand. The prayer of the bill is for a perpetual injunction and an accounting.

The joint of several counts of defendant's bill the relationship of the defendant, the latter count of the corporation, the location of the defendant's business conducted by the parties, the sale of the stock of defendant in the local Water Company to the defendant radio company; that the name "Water" was an integral part of the corporate name and was known to the customers and buying public and trade generally; that the trademark of said corporation was the word "Water" in a characteristic type in an oval with a dash extending from the upper right hand and the lower left hand corner of the oval and the advertising slogan of the corporation was the words "Defendant's Water" in a characteristic type of type, the words "Water" in the word "Water"; that this trademark and its slogan were well and favorably known and that the trademark was adopted or affixed on certain described products.

The answer specifically denies that the words "Water Co."

Chicago" and "Muter Chicago" were ever used as trademarks or slogans by complainant and states that the only reason the words were imprinted on the "guardian approved lightning arrestors" and other articles, as alleged in complainant's bill, was that such abbreviations rendered the words more legible on the limited space available on the article and were not used because of any advertising value. The answer also denies the allegations of the bill with reference to mail addressed to complainant under names other than the Leslie F. Muter Co.; that the products of the company were ever known to the customers, trade and public generally under the name "Muter" and "The Muter Co."; that the good reputation of the complainant company, its advertising and business under the name "The Muter Co." and of its merchandise under the name "Muter", either commenced, was developed, was well known to or was encouraged by the individual defendants, and that the alleged reputation has continued up to the present time and still continues. Defendants, on the contrary, state the true facts to be that only a small and infinitesimal part of the incoming mail was ever so addressed; that practically every case where such error has intervened is attributable to stenographic and clerical errors.

The answer specifically denies that the price paid by the Steinite Radio Company was due to the value of the trademark "Muter" or of the name "Muter Co.," or of its alleged tradename "Muter," or due to any of the other reasons alleged in the bill and denies that defendants are estopped from using the name "The Muter Co." or their own proper name, "Muter," as the name of any business which is selling radio products. The answer, on the contrary, avers that the real reason for the purchase of the stock in the complainant company by the Steinite Radio Company was that the Steinite Radio Company required the acquisition of the stock carrying with it the substantial business and earning record of the Leslie F. Muter Co.

Chicago" and "Water Works" were not used in connection with the
 by comparison and stated that the only known the words were in-
 printed on the "Water Works" and other
 articles, as alleged in defendant's bill, was that such articles
 these words were found on the limited space available
 on the article and was not used because of any particular value.
 The answer also denies the allegations of the bill with reference to
 will be used in connection with other names other than the Radio Co.
 further to; that the products of the company were never used to
 the company, Radio and other names generally used the name "Radio"
 and "The Radio Co."; that the good reputation of the company
 company, its advertising and business under the name "The Radio
 Co." and of its products under the name "Radio", either connected,
 was developed, was well known to or was suggested by the individual
 defendant, and that the alleged reputation was connected up to the
 present time and still continues. Defendant, on the contrary, states
 the true facts as he knew only a small and insignificant part of
 the foregoing and was never so engaged; that practically every case
 there such error has intervened is attributable to stenographic and
 clerical errors.
 The answer respectfully denies that the sales of the
 Radio Co. were at the value of the "Radio" and "Water"
 or of the name "Radio Co." or of the alleged trademark "Radio".
 or to any of the other names alleged in the bill and denies
 that defendant has adopted them using the name "The Radio Co."
 or their own proper name, "Radio", as the name of any business
 which is selling radio products. The answer, on the contrary, states
 that the Radio Co. for the purpose of the sales in the defendant
 company by the Radio Co. Company was that the Radio Co.
 Company required the registration of the name carrying with it the
 substantial business and selling record of the Radio Co. and

to give it sufficient standing to have its own capital stock listed for trade on the Chicago Stock Exchange.

Defendants deny that the name "Muter" or "Muter Co." was a controlling factor or an element of great importance in the building up of the business, good will and sale of the merchandise of the company; that the use of their proper name in the name of the corporation itself constitutes a trade-name or trademark, or that they or the company are estopped as to the complainant from using their corporate name or the proper name "Muter" as asserted in the bill. Defendants assert that they purchased the capital stock of the Campo Mfg. Co. for the purpose of acquiring patents and patent rights in and to a fixed resistance unit manufactured and sold under the trademark "Candohms." They admit the contract of Leslie F. Muter which they say was an "employment contract" with the Steinite Radio Company, dated October 23, 1928, at a salary of \$10,000 a year, for the period expiring September 30, 1930, and that it was agreed he should not, directly or indirectly, become associated during that time with any competing enterprise. They deny that after the sale of their stock Leslie F. Muter conceived and began to carry out any wrongful, fraudulent or malicious plan or scheme of ruining the business of the company and that he failed at all times to give his best efforts to the company and its affiliated company. They deny that his mismanagement or default in any respect had anything to do with bankruptcy proceedings brought against the complainant company, but allege that these were brought about by the dereliction of others, and the answer sets up facts at length, which, if true, would show such to be the fact. Defendants expressly deny that Leslie F. Muter left the employ of the company, as averred in the bill, and state that in the middle of June, 1930, he was arbitrarily and with-

to give it sufficient standing to have its own capital stock listed for trade on the Chicago Stock Exchange.

Defendants deny that the name "Water" or "Water Co."

was a controlling factor or an element of great importance in the building up of the business, good will and value of the corporation of the company; that the use of their proper name in the name of the corporation itself constitutes a trade-name or trademark, or that they or the company are entitled as to the complaint from using their corporate name at the proper name

"Water" as asserted in the bill. Defendants assert that they

purchased the capital stock of the Water Mfg. Co. for the purpose of acquiring patents and patent rights in and to a lined resistance unit manufactured and sold under the trademark "Condenser". They admit the contract of Leslie E. Water which they say was an "employment contract" with the defendant Water Company, dated October 25, 1924, at a salary of \$10,000 a year, for the period expiring September 30, 1930, and that it was agreed he should not, directly or indirectly, become associated during that time with any competing enterprise. They deny that after the sale of their stock to the Water Company and began to carry out any wrongful, fraudulent or malicious plan or scheme of retaining the business of the company and that he failed at all times to give his best efforts to the company and its affiliated company. They deny that his management or details in any respect had anything to do with the proper proceedings brought against the defendant company, but allege that there were threats about by the defendant of others, and the other was to be at Leslie E. Water, if true, would show such to be the fact. Defendants expressly deny that Leslie E. Water left the company of the company, as asserted in the bill, and state that in the month of June, 1930, he was explicitly and with-

out cause dismissed. They deny that subsequent losses were in any way attributable to any acts on his part or any of defendants but state, on the contrary, that they were due to the lack of business efficiency on the part of one Jacob Abelson and his family associates who were in control of the business. They expressly deny that the purchase of stock in the Compo Mfg. Co. was in violation of the contract of employment; that its business was ever in competition with the business of the Leslie F. Kuter Co.; that the Leslie F. Kuter Co. was in any way active in the sale of resistors to radio set manufacturers, and deny that Leslie F. Kuter took an active part in the business of the Compo Mfg. Co. before he was discharged. They deny that the investment by Leslie F. Kuter was in any way a violation of his employment contract.

The answer states that after his discharge, in order to mitigate his damages, Leslie F. entered the employ of the Utah Radio Products Co. and was so employed from July, 1930, until October 18, 1930, and admits that in October or November, 1930, Leslie F. caused the Compo Mfg. Co. to manufacture items of merchandise in competition with Leslie F. Kuter Co., as he had a right to do after the expiration of the employment contract. Defendants say that whether the complainant knew that he had then engaged in a competing business or not they neither affirm nor deny but call for strict proof thereof. They state that the total sales of all items made by the Compo Mfg. Co. in the year 1930, which could be construed as in competition with the Leslie F. Kuter Co. amounted to \$229.25. They admit that they procured the change of the name of the Compo Mfg. Co. to the Kuter Co.; that this included Leslie F. Kuter's own proper name and that of his family; deny that the name was changed for any fraudulent, wilful or wicked purpose or to confuse or mislead the customers or the public and the trade generally, or for the purpose of defrauding complainant

out cause himself. They deny that employment losses were in any way attributable to any loss on his part or any of his dependents but state, on the contrary, that they were due to the lack of business opportunity on the part of one Jacob Lerner and his family associates who were in control of the business. They expressly deny that the purchase of stock in the Go-go Mfg. Co. was in violation of the contract of employment; that the business was over in competition with the business of the Leslie F. Water Co.; that the Leslie F. Water Co. was in any way active in the sale of real estate or radio set manufacturers, and deny that Leslie F. Water took an active part in the business of the Go-go Mfg. Co. before he was discharged. They deny that the investment by Leslie F. Water was in any way a violation of his employment contract.

The answer states that after his discharge, in order to investigate his business, Leslie F. Water entered the employ of the Utah Radio Products Co. and was so employed from July, 1930, until October 18, 1930, and admits that in October or November, 1930, Leslie F. Water joined the Go-go Mfg. Co. to manufacture items of radio character in competition with Leslie F. Water Co., as he had a right to do after the expiration of the employment contract. Defendants say that neither the complaint nor that as had then engaged in a competing business or not they neither affirm nor deny but call for strict proof thereof. They state that the total sales of all items made by the Go-go Mfg. Co. in the year 1930, which could be contrasted to its competition with the Leslie F. Water Co. amounted to \$250.00. They admit that they procured the change of the name of the Go-go Mfg. Co. to the Water Co.; that this included Leslie F. Water's own proper name and that of his family; deny that the name was changed for any fraudulent, wilful or wicked purpose or to exclude or mislead the customers or the public and the trade generally, or for the purpose of defrauding competitors.

or appropriating its name, good will, trademarks or business, and aver that they did not in any way wish to be connected with the low business morals now dominant in the affairs of the Leslie F. Muter Co., and that they do not approve of the methods and manner in which Jacob Abelson and his family associates have, through inexperience, inefficiency and low business ideals, dragged their fair family name of "Muter" through financial and business mire and brought it into disrepute. They expressly deny that as a result of any fraudulent, wicked and willful designs and acts of defendants, the customers of complainant and the public and the trade generally have been misled into believing that defendant is the same corporation as the complainant; that there has been confusion in the mail and telephone calls and that complainant has been delayed or damaged in its business and reputation thereby; that the change of the name from the Compo Mfg. Co. to The Muter Co. was in violation of section 24 of the Corporation act, but, on the contrary, aver such change lawful. They deny that the adoption of the same style and type of invoices and billheads as had previously been used by the Leslie F. Muter Co. was pursuant to any fraudulent design or scheme of defendants and that there is any advertising value associated with the same. They say that the billheads and invoices were adopted merely pursuant to good business usage. They deny that they have designed to defraud or deceive complainant, the public, its customers or the trade generally or to palm off goods of the Muter Co. as those of complainant; that if the Muter Co. has produced or sold any articles that imitate any function or make-up of those of complainant, it has not done so with the design to defraud but because such parts are common property in the radio trade and are not protected with any patents and are open and free to all manufacturers. They deny that the Muter Co. has marked its radio parts, etc., "Muter Chicago," but

or appropriating its name, goods, will, trademark or business, and
 ever that they did not in any way wish to be connected with the
 low business outside now advanced in the article of the paper.
 Inter Co., and that they do not know of the methods and manner
 in which Jacob Johnson and his family associates have, through in-
 experience, intellectuality and low business ideas, directed their
 last family name of "Inter" through financial and business drive
 and brought it into disrepute. They expressly deny that as a re-
 sult of any trademark, which and willing design and acts of
 defendants, the customers of complaint and the public and the
 trade generally have been misled into believing that defendant is
 the same corporation as the complainant; that there has been con-
 fusion in the sale and shipment of goods and that complainant has
 been delayed or damaged in its business and reputation thereby;
 that the change of the name from the Inter Co. to the Inter
 Co. was in violation of section 44 of the Corporation Act, but, on
 the contrary, that such change is legal. They deny that the adoption
 of the same style and type of letters and initials as had previ-
 ously been used by the public. Inter Co. was pursuant to any
 trademark design or scheme of defendant and that there is any
 advertising value associated with the name. They say that the ill-
 heads and invoices were copied merely pursuant to good business
 usage. They say that they have defended to defend or preserve
 complaint, the public, the customers of the trade generally or to
 palm off goods of the Inter Co. as those of complainant; that if
 the Inter Co. has produced or sold any articles that infringe any
 trademark or design of complainant, it has not done so
 with the design to defend but because such price was common
 property in the trade and was not protected with any patent
 and are now and free to all manufacturers. They deny that the
 Inter Co. has stolen the trade name, style, "Inter Co." but

admit that it has marked the same with its corporate name, "The Muter Company Chicago," or the initials "T.M.C." which is the basis of its new trademark, as it has a legal right to do. They expressly deny any desire or intention to represent the products of the defendant company as the products of the complainant or to deceive and defraud; deny that they accepted orders for merchandise intended for complainant or that they fraudulently filled orders. They say that the total of all items that have been manufactured and sold by defendant Muter Company up to and including May 18, 1931, which by any possibility could be construed as competing items of merchandise with merchandise manufactured by complainant, does not exceed the sum of \$3324.24. They aver that complainant does not come into court with clean hands, in that it has attempted and is attempting to infringe upon patent rights in and to its resistance unit, known to the trade under the trademark "Candohms," owned by the defendant company and has recently employed one William D. McCord, a former employee and part owner of the Compo Mfg. Co., who was one of the contracting parties to sell the capital stock of the Compo Mfg. Co. to Leslie F. Muter. They expressly deny any and all manner of unlawful confederacy.

We shall not further follow the allegations of the answer. It is sufficient, we think, to say that it expressly denies any intention of fraud or deception in any way, and it must have been regarded by complainant as sufficient for the reason that no exceptions thereto were filed. The court had before it the bill, which was verified, this answer, which was verified, and the replication of complainant thereto. The court was obligated to give proper consideration to the answer. Under such circumstances a preliminary injunction will usually be denied. 7 Eney. of Evidence, 314; Krone v. Krone, 217 Md. 77; 32 Corpus Juris, 355.

It will be noticed, too, as defendants point out, that the

which it has named the same with the trademark name, "The
 Motor Company, Chicago," or the initials "T.M.C." which is the
 basis of the new trademark, as it has a legal right to do. They
 expressly deny any desire or intention to represent the products
 of the defendant company as the products of the complainant or to
 deceive and defraud; they state that they accepted orders for merchandise
 intended for complaint or that they transmitted filled orders.
 They say that the total of all items that have been manufactured
 and sold by defendant Motor Company up to and including May 15,
 1931, which by any possibility could be connected as coming
 from of merchandise with merchandise manufactured by complainant,
 does not exceed the sum of \$354.84. They aver that complainant
 does not come into court with clean hands, in that it has at-
 tempted to infringe upon patent rights in and to the re-
 spective unit, known as the trademark "Candor".
 owned by the defendant company and was recently employed one
 William G. Lord, a former employee and part owner of the Compa-
 ny, who was one of the contesting parties to all the capi-
 tal stock of the Compa-ny. G. Lord is a resident of Chicago. They expressly
 deny any and all manner of unlawful conspiracy.
 It shall not further follow the allegations of the answer.
 It is submitted, we think, to say that it expressly denies any
 intention of fraud or deception in any way, and it must have been
 regarded by defendant as sufficient for the reason that no ex-
 ceptions thereto were filed. The court had before it the bill,
 which was verified, this answer, which was verified, and the veri-
 fication of complaint thereto. The court was obligated to give
 proper consideration to the answer. Under such circumstances a
 preliminary injunction will usually be denied. V. Tracy, of Illinois,
 211 F.2d 890, 100 F.2d 771, 100 F.2d 771, 100 F.2d 771.
 It will be noticed, too, as defendant points out, that the

injunction as granted was a mandatory one. It does not, as a preliminary injunction is usually intended to do, preserve the status. It destroys the status and grants to complainant the same relief as if the cause had been finally disposed of after a hearing upon the merits. This court has clearly defined the purpose of a preliminary injunction. A preliminary injunction is generally supposed to be preventive in character, and its purpose usually is to preserve the status quo until a final hearing or to protect and preserve property from great and immediate injury. The doctrine has been well stated in 32 Corpus Juris 20, as follows:

"An interlocutory or preliminary injunction is a provisional remedy granted before a hearing on the merits, and its sole object is to preserve the subject in controversy in its then existing condition, and without determining any question of right. ***

If the facts conclusively show that it would be inequitable and unjust to award an injunction, the court has no discretion in the matter but must refuse it. A temporary injunction may be refused where a permanent injunction might be granted. ***

An injunction will not be granted when good conscience does not require it, where it will operate oppressively or contrary to justice, where it is not reasonable and equitable under the circumstances of the case, or where it will tend to promote, rather than to prevent, fraud and injustice."

In McDougall Co. v. Woods, 247 Ill. App. 170, this court after much consideration defined its duty upon appeals from interlocutory orders, as follows:

"The primary purpose of the statute is to permit a review of the exercise of the discretion lodged in the chancellor with the purpose of determining whether the interlocutory order probably was necessary to maintain the status quo and preserve the equitable rights of the parties." (High on Injunctions, 4th ed., sec. 1696; 32 Corpus Juris, p. 20; Bailton v. People, 83 Ill. App. 396, and Friedman v. Peckler, 255 Ill. App. 199, are to the same effect.)

That that rule has since been consistently followed will appear from an examination of Fishwick v. Lewis, 258 Ill.App.402; Ruhl v. Clark, 261 Ill.App.491; Lincoln Trust & Sav.Bank v. Nelson, 261 Ill.App.370.

Since this injunction is mandatory in its nature and does not preserve the status quo but, on the contrary, destroys it, giving to complainant all the benefit which it might obtain by a decision in

its favor upon the merits, it would seem it must be held to have been improvidently granted, unless, as complainant contends, on the uncontradicted facts and admissions made by defendants, complainant is entitled to the order. Complainant earnestly insists that this is the case, relying principally upon the authorities of Van Auken v. Van Auken Steam Specialty Co., 57 Ill. App. 240, and McFell Electric & Telephone Co. v. McFell Electric Co., 110 Ill. App., 182, both of which follow the leading case of Holmes v. Holmes, etc. Co., 37 Conn. 278. Nims on Unfair Competition, 3rd ed., 1929, pp. 266-277, 84, 235, 250, as well as the cases there relied on, is also cited. Neither the Van Auken case nor the case of McFell, however, involved an appeal from an interlocutory order, and in that respect these cases are distinguishable from the one which we are here required to consider.

It would be an almost impossible task to review the cases from this and other jurisdictions passing upon phases of this question. There is no claim here that these defendants have contracted away the right to use their own names. The answer expressly denies every allegation of fraud or fraudulent intent, and fraud is certainly never to be presumed. The theory of complainant's case is and must be that on the admitted facts defendants are equitably estopped from using their names which had been given by their consent to the corporation Leslie F. Muter Co., when it was first organized. The question of law here to be decided therefore concerns the right of a defendant in the absence of some agreement to the contrary on his part to use his own name for business purposes in competing with another who uses the same or a similar name. The cases have been collected in an annotation to the case of Seligman v. Fenton, 286 Pa. 372, 133 Atl. 561, as reported in 47 A.L.R. 1186. The general rule seems to be that in the absence of a self-imposed restraint a natural person has a right to the honest use of his family name in

its favor upon the merits, it would seem it must be held to have been implicitly granted, unless, as complainant contends, on the uncontradicted facts and admissions made by defendants, complainant is entitled to the order. Complainant expressly insists that this is the case, relying principally upon the authorities of Van Anken v. Van Anken Steam Specialty Co., 57 Ill. App. 2d, and McKell v. Electric Co., 110 Ill. App. 132, both of which follow the leading case of Holmes v. Palmer, etc. Co., 37 Conn. 270. Rime on Unfair Competition, 374 ed., 1927, pp. 260-277, 84, 232, 250, as well as the cases there relied on, is also cited. Neither the Van Anken case nor the case of McKell, however, involved an appeal from an interlocutory order, and in that respect these cases are distinguishable from the one which we are here required to consider.

It would be an almost impossible task to review the cases from this and other jurisdictions passing upon phases of this question. There is no claim here that these defendants have contrived away the right to use their own names. The answer expressly denies every allegation of fraud or fraudulent intent, and there is certainly never to be presumed. The theory of complainant's case is and must be that on the admitted facts defendants are equitably estopped from using their names which had been given by their consent to the corporation Leslie T. Water Co., when it was first organized. The question of law here to be decided therefore concerns the right of a defendant in the absence of some agreement to the contrary on his part to use his own name for business purposes in competing with another who uses the same or a similar name. The cases have been collected in an annotation to the case of Religman v. Benton, 286 Pa. 372, 133 Atl. 561, as reported in 47 A.L.R. 1185. The general rule seems to be that in the absence of a well-imposed restraint a natural person has a right to the honest use of his family name in

conducting any business, though it may be detrimental to others, and such right has been upheld in the following cases decided by the Supreme court of Illinois: Hazelton Boiler Co. v. Hazelton Triped Boiler Co., 142 Ill. 494; Ranft v. Reimers, 200 Ill. 386; Nestor Johnson Mfg. Co. v. Alfred Johnson Skate Co., 313 Ill. 106. The rule, however, is subject to limitations, which, as was stated in J. I. Case Flow Works v. J. I. Case Threshing Mach. Co., 162 Wis. 185, 155 N.W. 128, are based upon "simply the principles of old-fashioned honesty," and there seems to be substantial agreement that even a man's own name must not be used with the fraudulent intent of appropriating another's reputation or good will or of passing off his goods as those of another, particularly where the name has acquired a secondary meaning. To this proposition, also, the Illinois cases agree. See also Allegretti v. Allegretti Chocolate Cream Co., 177 Ill. 129.

It also seems to be the rule that a defendant's right to the use of his own name may under peculiar circumstances be upheld but only upon conditions imposed, such as, that he shall make a clear differentiation between his name and that of the other party, and to this proposition the cases cited also commit the courts of this State.

Complainant, however, contends here, as we understand it, on the authority of Van Auker Co. v. Van Auker Steam Specialty Co., 57 Ill. App. 240, that it is unnecessary to establish the fact of fraud in order to justify the issuance of an injunction. The court there stated:

"The tendency in this case to confuse and mislead by the resemblance or similarity of the two names is so obvious that no multiplication of words could make it clearer, and upon that mere tendency, without reference to any question of fraud which the parties have argued, we are of opinion that the decree should be affirmed, which is accordingly done."

There is language to the same effect in McFell Electric & Telephone Co. v. McFell Electric Co., 110 Ill. App. 182, indicating that the

conducting any business, though it may be detrimental to others, and such right has been upheld in the following cases decided by the Supreme Court of Illinois: Harrison v. Harrison, 12 Ill. 373; Tripp v. Tripp, 142 Ill. 404; Smith v. Smith, 200 Ill. 373; Heater v. Heater, 211 Ill. 102; Heater v. Heater, 211 Ill. 102. The rule, however, is subject to limitations, which, as was stated in J. I. Case v. J. I. Case, 182 Ill. 102, are based upon "simply the principles of life-tenanted property," and there seems to be substantial agreement that even a man's own name must not be used with the fraudulent intent of appropriating another's reputation or good will or of passing off his goods as those of another, particularly where the name has acquired a secondary meaning. In this proposition, also, the Illinois cases agree. See also Albright v. Albright, 182 Ill. 102.

It also seems to be the rule that a defendant's right to the use of his own name may under peculiar circumstances be upheld but only upon conditions imposed, such as, that he shall make clear differentiation between his name and that of the other party, and in this proposition the cases cited also concur in courts of this State.

Complaint, however, contains a recital, as we understand it, on the authority of Van Allen v. Van Allen, 182 Ill. 102, that it is unnecessary to establish the fact of fraud in order to justify the issuance of an injunction. The court there stated:

"The tendency in this case to confuse and mislead by the resemblance or similarity of the two names is an obvious fact no multiplication of words could make it clearer, and upon that more tendency, without reference to any question of fraud which the parties have raised, we are of opinion that the decree should be affirmed, which is accordingly done."

There is language in the same effect in Albright v. Albright, 182 Ill. 102, indicating that the

mere assumption of a similar name, although one's own, should be considered as constituting fraud. In construing this language, however, it must be remembered that in both the Van Auker and the McFell cases, the cause had been heard upon its merits and a preliminary injunction was not in any way involved. It is also apparent that in both cases actual fraud had been abundantly proved in the opinion of the court. Here, every inference of fraud had been denied by the answer. Defendants were entitled to have the issues tried upon the merits before the case should be finally decided. It may be that upon such hearing fraud will be proved to the satisfaction of the chancellor, and if so, complainant of course would be entitled to a permanent injunction. Upon that question, however, we express no opinion. The decision may well await the entire record where all the facts will be disclosed.

The order for the preliminary injunction will be reversed.

REVERSED.

O'Connor, P. J., and McSurely, J., concur.

new assumption of a slight case, although the same would be
 considered as conclusive proof. In considering this fact,
 however, it must be remembered that in both the Van Wagon and the
McCall cases, the same had been proved upon the facts and a pre-
 sumption of fact was made in each case. It is also suggested
 that in both cases actual fraud had been conclusively proved in the
 opinion of the court. Here, every inference of fraud had been
 denied by the answer. Statements were admitted to have the fraud
 proven upon the facts before the case should be finally decided.
 It may be that upon these facts fraud will be proved to the
 satisfaction of the chancellor, and if so, judgment of course
 would be entered in a permanent injunction. Upon that question,
 however, we express no opinion. The decision may well result in
 entire record where all the facts will be decided.
 The order for the preliminary injunction will be reversed.

REVEREND.

October 1, 1881, at New York, N.Y., County.

35136

JOSEPH MENSIK, for the use of
WILLIAM J. DILLON and JAMES L.
KONTKA, his attorneys,

Appellee,

v.

JOHN MASEK and JOSEFA MASEK,

Appellants.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

265 I.A. 606⁵

Opinion filed March 16, 1932

MR. PRESIDING JUSTICE HENEL DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendants from a judgment for \$1,531, entered upon the verdict of a jury in favor of the plaintiff. The suit was for money claimed to be due for extra work and materials furnished by the plaintiff upon verbal orders of the defendants during the course of the construction of a two flat building in the Village of Brookfield.

The declaration consists of a special count and the common counts, and seeks to recover \$2,492. The defendants filed a plea of the general issue and two special pleas. One is a plea of set-off alleging that the plaintiff was indebted to the defendants in the sum of \$3,765, and the other plea is that of payment.

The evidence of the plaintiff is, substantially, that the original contract dated October 27, 1923, did not provide for a sun-parlor to be extended above the first floor. The front wall of the building had already been built almost to its height when Josephine Masek, one of the defendants, visited the building and told Fred Giffert, foreman for the builder, Joseph Mensik, that she wanted the sun-parlor extended to the second floor, and also wanted the front doors changed. She was told by Giffert that it would cost \$1000 or more, and she replied, "All right", and that she would pay the cost. The wall was then taken down in order to make the change for the extension of the sun-parlor. It also appears from the record that Christine Komorous, the defendants' daughter, testified that

JOHN W. BERRY, for the use of
WILLIAM J. BERRY and JAMES L.
BERRY, his attorneys,

appellees,

v.

JOHN W. BERRY and JAMES L. BERRY,

appellants.

DOES COME.

2651.A. 606

Opinion filed March 16, 1932

MR. JUSTICE BRIDGES delivered the opinion of the court.

This is an appeal by the defendants from a judgment

for \$1,631, entered upon the verdict of a jury in favor of the

plaintiff. The suit was for money claimed to be due for extra work

and materials furnished by the plaintiff upon verbal orders of the

defendants during the course of the construction of a two flat build-
ing in the village of Brookfield.

The declaration consists of a special count and the

common counts, and seeks to recover \$8,402. The defendants filed a

plea of the general issue and two special pleas. One is a plea of

set-off alleging that the plaintiff was indebted to the defendants

in the sum of \$5,750, and the other plea is that of payment.

The evidence of the plaintiff is, substantially, that

the original contract dated October 27, 1925, did not provide for

a sun-parlor to be extended above the first floor. The front wall

of the building had already been built almost to its height when

Josephine Hanes, one of the defendants, visited the building and told

two different foremen for the builder, Joseph Keadik, that she

wanted the sun-parlor extended to the second floor, and also wanted

the front door enlarged. She was told by Keadik that it would cost

\$1000 or more, and she replied, "All right", and that she would pay

the cost. The wall was then taken down in order to make the change

for the extension of the sun-parlor. It also appears from the record

she heard her father and mother speak of the front wall of the building being torn down. It also appears from the evidence that the plaintiff Mensik met Mrs. Masek at the building and asked her who gave the order to tear down the front wall, and Mrs. Masek told him that she had given the order. The plaintiff then advised her that it would cost considerable money to make the change in the sun-parlor and front door, and that he would let her know the cost of this change. A short time thereafter he met Mrs. Masek and told her that the change would cost about \$1100. Mrs. Masek stated, according to the plaintiff's testimony, that she did not care what the cost would be, she wanted the change made and that she would pay for the same.

There is a conflict in the evidence regarding the brick pier on the back porch being an extra, and its cost. There is evidence that two extra dormers were built; that Mr. and Mrs. Masek promised to pay for the material and labor, and that the cost of the dormers was \$140 each. The plaintiff also testified that it would cost \$350 to tear down the wall; \$350 for new brick and labor, and \$400 to build the sun-parlor on the second floor of the building, making a total of \$1100.

From the evidence offered by the plaintiff it further appears that four brackets for bookcases were installed upon the request of Mrs. Masek at a cost of \$12.00 each. There was a charge of \$36 for an additional partition in the basement, \$186 for material and labor for the extra painting, and that there was a change made from a wooden floor in the vestibule and front porch to a mosaic floor, and that this change cost \$18 for the carpenters in preparing the floor, and \$187 for the mosaic work. After allowing a credit for certain ice-boxes, the total claimed for this extra work amounts to \$1,979.

she heard her father and mother speak of the front wall of the building being torn down. It also appears from the evidence that the plaintiff knew that Mrs. Mack of the building had asked her who gave the order to tear down the front wall. Mrs. Mack told him that she had given the order. The plaintiff then advised her that it would cost considerable money to make the change in the sun-parlor and front door, and that he would let her know the cost of this change. A short time thereafter Mrs. Mack and told her that the change would cost about \$1100. Mrs. Mack stated, according to the plaintiff's testimony, that she did not care what the cost would be, she wanted the change made and that she would pay for the same.

There is a conflict in the evidence regarding the price paid on the back porch being an extra, and its cost. There is evidence that two extra doors were built; that Mr. and Mrs. Mack promised to pay for the material and labor, and that the cost of the same was \$140 each. The plaintiff also testified that it would cost \$300 to tear down the wall; \$250 for new brick and labor, and \$400 to build the sun-parlor on the second floor of the building, making a total of \$1100.

From the evidence stated by the plaintiff it further appears that four windows for sash were installed upon the request of Mrs. Mack at a cost of \$12.00 each. There was a charge of \$5 for an additional partition in the basement, \$100 for material and labor for the extra painting, and that there was a charge made from a wooden floor in the vestibule and front porch to a mosaic floor, and that this change cost \$18 for the carpenter in preparing the floor, and \$157 for the mosaic work. After allowing a credit for certain ice-boxes, the total claimed for this extra work amounts to

It also appears from the evidence of the defendants that the building was not completed on April 1, 1924, the date fixed for completion, but on May 24, 1924; that the defendants moved into the building on May 4, 1924, before completion; that Masek, one of the defendants, testified, in substance, that the gas and water pipes were not connected with the mains; that he paid John Bielek \$50.00 for painting; Halvik, \$57 for scraping the floors; Bolny, \$58 for building the stairs, and that certain other items were paid by this defendant; that August Sobotka, a witness appearing for the defendants, testified that he was an officer of the Oicero Trust & Savings Bank; that he paid out of the building account of the Masek's in the bank, \$13,000; that \$11,110 was paid to Mensik, the building contractor, and the balance, \$1,890, was paid to the sub-contractors.

The first objection of the defendants to be considered is that the verdict of the jury is manifestly against the weight of the evidence. The evidence offered by the plaintiff and the defendants was heard by the jury, and while there is a conflict in the evidence, the record discloses evidence which tends to support the plaintiff's declaration, and unless we can say from the whole record that the verdict and judgment are against the manifest weight of the evidence, this court will not disturb the judgment entered upon the verdict of the jury.

The jury had the opportunity of observing the witnesses' appearance and candor while testifying, the truth of their several statements, and their interest, if any, in the outcome of the litigation, all of which are factors in determining the issues between the parties, and from the record we are not inclined to sustain the defendants upon this point.

The defendants complain that the court erred in refusing to give instructions Nos. 3 and 5. The plaintiff in instruction No. 3 was required by law to establish his cause by a preponderance of the

It is also apparent from the evidence of the defendants that the building was not completed on April 1, 1934, the date fixed for completion, but on May 14, 1934; that the defendants moved into the building on May 4, 1934, before completion; that Messrs. one of the defendants, testified, in substance, that the gas and water pipes were not connected with the main; that he paid John Black \$50.00 for painting; Halvik, \$7 for sweeping the floors; Holm, \$25 for building the stairs, and that certain other items were paid by this defendant; on August 30, 1934, a witness appearing for the defendants testified that he was an officer of the Citizens Trust & Savings Bank; that he paid out of the building account of the bank's in the bank, \$13,000; that \$11,110 was paid to Messrs. the building contractor, and the balance, \$1,890, was paid to the sub-contractors.

The first objection of the defendants to be considered is that the verdict of the jury is manifestly against the weight of the evidence. The evidence offered by the plaintiff and the defendants was heard by the jury, and while there is a conflict in the evidence, the record discloses evidence which tends to support the plaintiff's declaration, and unless we can say from the whole record that the verdict and judgment are against the manifest weight of the evidence, this court will not disturb the judgment entered upon the verdict of the jury.

The jury had the opportunity of observing the witnesses, appearance and conduct while testifying, the truth of their several statements, and their interest, if any, in the outcome of the litigation, all of which are factors in determining the issues between the parties, and from the record we are not inclined to sustain the defendants upon this point.

The defendant complains that the court erred in refusing to give instructions No. 3 and 5. The plaintiff in instruction No. 3 was required by law to establish his cause by a preponderance of the

evidence before he could recover. Instruction No. 4 is to the same effect "that as a matter of law the burden of proof is upon the plaintiff, and it is for him to prove his case by a preponderance of the evidence". The case submitted to the jury did not consist solely of issues upon the declaration, but also included affirmative issues raised by the defendants. As to those issues, the burden of proof was upon the defendants. Richelieu Hotel Co. v. International Military Encampment Co., 140 Ill. 348.

The instructions refused by the court imposed a burden upon the plaintiff not sanctioned by law in requiring the plaintiff not only to establish by a preponderance of evidence the averments of the plaintiff's declaration, but also to establish his case by evidence offered by both the plaintiff and the defendants upon the issues of the case. The defendants concede that instruction No. 4 was properly refused by the court for the reason that the instruction required the plaintiff to establish his case not only by his own evidence, but also by that of the defendants. The application of the rule of law contained in the refused instructions to the issues before the jury was such as likely to mislead them, and the court was fully justified in refusing to give these instructions to the jury.

The defendants also contend that the court erred in refusing to permit the defendants to introduce evidence to the effect that the contract introduced by the plaintiff was not complete. This contract in evidence was signed by both parties, together with the specifications, but the claim is that the plans were not accepted and do not constitute part of the signed contract. The trial court permitted the defendants to offer evidence that the plans were not signed by the defendants for the reason that they were not in accordance with the plans and specifications drawn by an architect. This fact was before the jury and the court was undoubtedly right in not permitting the defendants to introduce evidence to change, alter, or vary the terms of the written contract.

...evidence before he could recover. Instruction No. 4 is to the same effect as a matter of law the burden of proof is upon the plaintiff, and it is for him to prove his case by a preponderance of the evidence. The case admitted to the jury did not consist solely of issues upon the instruction, but also included affirmative issues raised by the defendant. As to these issues, the burden of proof was upon the defendant. Inglish Hotel Co. v. International Utility Company, 140 Ill. App. 2d 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

It is insisted that the provisions in the contract for arbitration in case of differences between the parties must be submitted to an arbitrator whose decision upon any questions between the parties should be final. The defendants call attention to the fact that the declaration is silent as to any averment that an offer to arbitrate was made, or that the same was refused or waived by the defendants, and because of failure to arbitrate, the plaintiff cannot maintain his action. The rule is that where the items sued upon are for extra work and materials furnished of a different character from those specified in the contract, the provision in the contract for arbitration does not apply, Chicago and Eastern Illinois Railroad Co. v. Moran, 187 Ill. 316. From the evidence it is apparent that the work and materials furnished by the plaintiff at the request of the defendants, are no part of the original contract. Therefore, the parties were not required to submit this controversy to arbitration. Citing Chicago and Eastern Illinois R. R. Co. v. Moran, supra.

One of the provisions in the contract is as follows:

"And for the true and faithful performance of all and every of the covenants and agreements above mentioned the parties to these presents bind themselves each to the other in the penal sum of \$1,000, as fixed and liquidated damages to be paid by the failing party."

The defendants' contention is that Mensik, the contractor, did not show any good reason for the delay, or a waiver by the defendants of the provision in the contract for the completion of the contract within the time specified. There is evidence in the record that Mensik was delayed by the change of the wooden floor to a mosaic floor; that extra brackets were ordered; also mill work for the second floor sun-parlor, and a coal bin and partition were ordered and built, all of which took place from the 1st to the 15th of April of that year.

It is insisted that the provisions in the contract for arbitration in case of differences between the parties must be submitted to an arbitrator whose decision upon any questions between the parties should be final. The defendant calls attention to the fact that the arbitration is alleged to be an agreement that an effort to arbitrate was made, or that the same was refused or waived by the defendant, and because of failure to arbitrate, the plaintiff cannot maintain his suit. The rule is that where the items sued upon are for extra work and materials furnished of a different character from those specified in the contract, the provision in the contract for arbitration does not apply. Chicago and Western Illinois Railroad Co. v. Hornum, 187 Ill. 218. From the evidence it is apparent that the work and materials furnished by the plaintiff at the request of the defendant, were part of the original contract. Therefore, the parties were not required to submit this controversy to arbitration. Chicago and Western Illinois R. Co. v. Hornum, 187 Ill. 218.

3-17-11, 11-10-11

One of the provisions in the contract is as follows:

"and for the same and related purposes of all and every of the governments and peoples now mentioned and parties to these treaties and gives each to the other in the general sum of 1,000,000, as fixed and limited damages to be paid by the United States."

and milk, all of which were taken from the lot to the 1st of the second floor apartment, and a coal bin and partition were ordered mosaic floor; that extra brackets were ordered; also mill work for that would be delivered by the owner of the wooden floor to a contract within the time specified. There is evidence in the record and of the provision in the contract for the completion of the did not show any good reason for the delay, or a waiver by the defendant. The defendant's contention is that it was, the contractor, April of that year.

The defendants insist, however, that the case of Lu-Mi-Nus Sins v. Jefferson Shoe Stores, 257 Ill. App. 150, is authority for the right of the defendants to recover \$1,000 as liquidated damages, the amount provided for in the contract. It would be unreasonable to enforce the provisions of this contract where the defendants requested work to be done which required further time after April 1, 1923, the date fixed in the contract for completion.

This court, however, held in that case that whether or not a provision in an agreement for an amount payable on default is one for liquidated damages or a penalty, and it is doubtful what the intentions of the parties are, gathered from the instrument, the courts will construe such provision to be a penalty which would warrant a recovery by the injured party for compensatory damages.

The reasonable construction of this provision in the contract is that of a penalty rather than a forfeiture of \$1000, as liquidated damages.

There is no evidence in the record of actual damages sustained by the defendants herein by reason of the delay, and therefore there is no merit to the defendants' contention upon this point.

Instructions Nos. 6 and 7 relate to defendants damages and were properly refused by the court in that the instructions are but conclusions and do not correctly instruct the jury that the defendants in the instructions have the affirmative to establish their special pleas by a preponderance of the evidence.

The defendants complain that under the rules of the Superior Court of Cook County the trial court did not afford them an opportunity to be heard and to state their several objections to the instructions offered by the parties, given and refused. The record does not disclose that the defendants asked for and were denied a hearing. We therefore assume that the trial court followed the rules of the Superior Court.

We have considered the objections made that we regard material, and finding no error in the record, the judgment is affirmed.

FRIEND AND WILSON, JJ. CONCUR.

AFFIRMED.

The defendants insist, however, that the case of

La-Michie v. Johnson, 100 Ill. App. 2d 100, is authority for the right of the defendant to recover \$1,000 as liquidated damages, the amount provided for in the contract. It would be unreasonable to enforce the provision of this contract where the defendant is not liable for the work which required further time after April 1, 1933, the date fixed in the contract for completion.

This court, however, held in that case that whether or not a provision in an agreement for an amount payable on default is one for liquidated damages or a penalty, and it is doubtful that the intentions of the parties are gathered from the instrument, the courts will construe such provision to be a penalty which would warrant a recovery by the injured party for compensatory damages. The reasonable construction of this provision in the contract is that of a penalty rather than a forfeiture of 1933, as liquidated damages.

There is no evidence in the record of actual damages sustained by the defendant herein by reason of the delay, and therefore there is no basis for the defendant's contention upon this point. Instructions Nos. 6 and 7 relate to defendant's damages and were properly refused by the court in that the instructions are mere conclusions and do not correctly instruct the jury that the defendant in the instructions have the obligation to establish their special phase by a preponderance of the evidence.

The defendant complains that under the rules of the Superior Court of Cook County the trial court did not afford them an opportunity to be heard and to state their several objections to the instructions offered by the parties, given and refused. The record does not disclose that the defendant asked for and was denied a hearing. It appears, however, that the trial court followed the rules of the Superior Court.

We have considered the objections made that we regard material, and finding no error in the record, the judgment is

35199

PEOPLE OF THE STATE OF ILLINOIS,

Defendant in Error,

v.

JOHN FREEMAN,

Plaintiff in Error.

81
ERROR TO

CRIMINAL COURT

COOK COUNTY.

265 I.A. 607

Opinion filed March 16, 1932

MR. PRESIDING JUSTICE NEBEL DELIVERED THE OPINION OF THE COURT.

Plaintiff in error, John Freeman, hereinafter called the defendant, was found guilty of contempt in the Criminal Court of Cook County on March 19, 1931, and sentenced to 60 days imprisonment in the House of Correction. From this judgment of the court, the defendant sued out a writ of error and the cause is now pending in this court.

The points urged for reversal by the defendants are:

The finding of the Court is fatally insufficient to support a judgment of guilty.

The trial Judge misapprehended the nature of the alleged criminal act.

The attachment for contempt in this case afforded no legal basis for the finding of fact and judgment of the court.

The sufficiency of the facts appearing in the order before this court is questioned by the defendant. The facts in the order are, substantially, that a case was being tried in the Criminal Court of Cook County, entitled *The People v. Irene Breedlove*, for robbery growing out of the robbery by Irene Breedlove from one Sam Levine, on March 3, 1931; that counsel for the defendant Irene Breedlove demanded a trial by jury; that the defendant advised the court that she did not desire a jury trial, but desired to be tried by the Honorable Harry M. Fisher, the judge presiding. The court upon questioning counsel appearing for Irene Breedlove was advised that he had been retained by the defendant, whereupon the

21110

STATE OF NEW YORK

County of New York

v.

JOHN J. LEVINE

Defendant in Error

CRIMINAL COURT

JOHN J. LEVINE

2051.A.007

Opinion filed March 16, 1932

MR. JUSTICE LEVINE, delivered the opinion of the court.

The finding in error, John J. Levine, hereinafter called

the defendant, was found guilty of robbery in the Criminal Court

of Cook County on March 16, 1931, and sentenced to 30 days imprisonment

in the House of Correction. From this judgment of the court,

the defendant appeals and a writ of error and the same is now pending

in this court.

The points urged for reversal by the defendant are:

The finding of the court is legally incorrect to support a judgment of guilty.

The trial judge misapprehended the nature of the alleged criminal act.

The statement of the witness in this case afforded no legal basis for the finding of fact and judgment of the court.

The sufficiency of the issue appearing in the order

before this court is questioned by the defendant. The facts in

the order are, respectively, that a case was held in the

Criminal Court of Cook County, entitled The People v. John J. Levine,

for robbery resulting out of the robbery of Irene Brodovoy (now was

his Levine, on March 16, 1931; that counsel for the defendant John

Brodovoy demanded a trial by jury; that the defendant waived the

right that she did not desire a jury trial, but desired to be

tried by the Honorable Henry A. Fisher, the Judge presiding. The

court then proceeded to proceed for Irene Brodovoy was

advised that he had been retained by the defendant, whereupon the

defendant advised the court that she had not retained counsel and wanted an immediate trial; that the court observed one John Freeman loitering around the court room, and upon being advised by the said counsel that he was retained to defend said Irene Breedlove by John Freeman, the court caused John Freeman to step to the bar, and he was sworn and questioned as to his interest in this criminal case. John Freeman, after being sworn, testified that he was requested by Leon Pope to engage counsel for the defendant Irene Breedlove, and paid him Freeman \$30.00 which he in turn was to pay to counsel to represent her.

Leon Pope, called as a witness, testified that he did not at any time talk to John Freeman with reference to obtaining counsel for Irene Breedlove; that he did not at any time engage counsel for Irene Breedlove, and did not pay John Freeman \$30.00, or any other sum.

The court again caused John Freeman to be sworn, and in open court John Freeman testified that he had lied when he testified in court that he had been paid \$30.00 by Leon Pope with which to retain an attorney for Irene Breedlove.

It further appears from the order that John Freeman wilfully and corruptly lied and committed perjury in the presence of the court, and that he stands in contempt of court for swearing falsely in the presence of the court, such false swearing being admitted by him in the presence of the court when he said that he lied to the material things concerning which he had testified.

It also appears from the order that the court sentenced John Freeman to the House of Correction for a term of 60 days for contempt of court, unless sooner discharged by law.

The record before us contains only the order of the court committing the defendant to the House of Correction for the term fixed

defendant advised the court that she had not retained counsel and
wanted an immediate trial; that the court ordered John Freeman
to appear in the court room, and when being advised by the said
counsel that he was retained to defend said Irene Breedlove by
John Freeman, the court ordered John Freeman to step to the bar, and
he was sworn and questioned as to his interest in this criminal case.
John Freeman, after being sworn, testified that he was requested
by Isaac Pope to engage counsel for the defendant Irene Breedlove,
and said that Freeman \$30.00 which he in turn was to pay to counsel
to represent her.
Isaac Pope, called as a witness, testified that he did
not at any time talk to John Freeman with reference to obtaining
counsel for Irene Breedlove; that he did not at any time engage
counsel for Irene Breedlove, and did not pay John Freeman \$30.00,
or any other sum.
The court again ordered John Freeman to be sworn, and in
open court John Freeman testified that he had lied when he testified
in court that he had been paid \$30.00 by Isaac Pope with which to
retain an attorney for Irene Breedlove.
It further appears from the order that John Freeman
willfully and corruptly lied and committed perjury in the presence of
the court, and that he stands in contempt of court for swearing
falsely in the presence of the court, such false swearing being
attested by him in the presence of the court when he said that he
did to the material things concerning which he had testified.
It also appears from the order that the court sentenced
John Freeman to the House of Correction for a term of 60 days for
contempt of court, unless sooner discharged by law.
The record before us contains only the order of the court
committing the defendant to the House of Correction for the term fixed

and the point made by the defendant is that the court erroneously committed him for the reasons stated in the order of commitment.

It is a rule of law that in a proceeding to commit and punish for contempt for false swearing in the presence of the court, the court must have knowledge of its falsity, which is indispensable in order that the court may exercise its authority to punish for such contempt, and this must appear from the witness's own admission that his evidence is false, or by unquestioned or incontrovertible evidence. Otherwise, the court would act merely upon its belief or conclusion derived from evidence heard, and not upon the facts of which it had judicial cognizance. People v. Stone, 181 Ill. App.475; People v. Hille, 193 Ill. App. 139.

From the record in this case it appears that the trial court knew from the defendant's own admissions made in open court that his testimony was false, and the defendant knew at the time he testified that it was false, and did so with intent to interfere with the trial then pending between the People of the State of Illinois and Irene Breedlove, in the Criminal Court. People v. Hille, *supra*.

This defendant, a stranger to the proceeding, retained a lawyer to appear in the Criminal Court when the trial of Irene Breedlove was about to proceed. The appearance of this attorney, when the case was called, was without the consent of Irene Breedlove, and she voiced her objection to such appearance. All of this appears in the Court's finding and order entered in this cause.

When Freeman's activity was called to the attention of the court, he attempted to justify his procedure by testifying that one Pope asked him to retain counsel to appear for Irene Breedlove in the Criminal Court, and when confronted by the witness Pope, who testified and denied the statement made by Freeman, he admitted that

and the point made by the defendant is that the court expressly

committed him for the reasons stated in the order of commitment.

It is a rule of law that in a proceeding to commit and

commitment for contempt for false swearing in the presence of the court,

the court must have knowledge of its falsity, which is established

in order that the court may exercise its authority to commit him for

such contempt, and this must appear from the witness's own admission

that his evidence is false, or by admission or inadmissible

evidence. Otherwise, the court could not lawfully upon the basis of

evidence derived from evidence heard, and not upon the facts of

which it had judicial notice. People v. Jones, 121 Ill. App. 435;

People v. Hill, 123 Ill. App. 125.

From the record it also appears that the trial

court knew from the defendant's own admission made in open court

that his testimony was false, and the defendant knew at the time he

testified that it was false, and did so with intent to interfere with

the trial then pending between the People of the State of Illinois

and John Preslow, in two criminal cases, People v. Hill, supra,

This defendant, a stranger to the proceeding, retained

a lawyer to appear in the criminal court when the trial of John

Preslow was about to proceed. The appearance of this defendant,

when the case was called, was without the consent of John Preslow, and

and he voiced her objection to such appearance. All of this appears

in the Court's finding and order entered in this cause.

When Preslow's attorney was called to the attention of

the court, he attempted to justify his procedure by testifying that

and John asked him to retain counsel to appear for John Preslow

in the criminal court, and when confronted by the witness John, who

testified and denied the statement made by Preslow, he admitted that

his testimony was false and that he had lied to the court. This was an unwarranted interference with the procedure of the court and was a direct contempt in the presence of the court; and the court could proceed to pass judgment, which it did, and punish the defendant.

Counsel calls our attention to the objection made by the defendant that the court erred in its attachment order for contempt commanding the sheriff to take John Freeman to answer unto the People of the State of Illinois for a contempt of court in not attending said court as a witness, and that this attachment is a contradiction of the order of contempt entered by the court in the case now before us.

In the case of People v. Gard, 259 Ill. 238, the court held that where acts constituting contempt have been done in the presence of the court- and constitute direct contempt - an order of commitment may be lawfully entered without any preliminary proceeding. So in the case at bar the acts of the defendant in the presence of the court were a direct contempt and punishable as such, and the order of commitment in this case was lawfully entered, and the attachment for John Freeman for failure to appear as a witness does not limit or contradict the order; it was issued solely to bring Freeman before the court. Therefore, the court was fully justified in proceeding in a summary manner, as it did when it entered the commitment order. Objections were not offered by the defendant to the court procedure, but objection was made by him for the first time in this court to the sufficiency of the order.

The point is also made that the alleged statements of John Freeman were not made after he was sworn in the case entitled

his testimony was false and that he had lied to the court. This was an admitted interference with the procedure of the court and was a direct contempt in the presence of the court; and the court could proceed to punish him, which it did, and punish the defendant. Counsel calls our attention to the objection made by

the defendant that the court acted in its discretion order for contempt commencing the inquiry in the form of a question to answer who the people of the State of Illinois for a contempt of court is not attending said court as a witness, and that this attachment is a continuation of the order of contempt entered by the court in the case now before us.

In the case of People v. Ward, 220 Ill. 522, the court held that there were constitutional grounds have been shown in the presence of the court and constitution itself contended - an order of contempt may be lawfully entered without any preliminary proceedings. So in the case at bar the acts of the defendant in the presence of the court were a direct contempt and punishable as such, and the order of contempt in this case was lawfully entered, and the attachment for John Freeman for failure to appear as a witness does not limit or contradict the entry; it was issued solely to bring Freeman before the court. Therefore, the court was fully justified in proceeding in a summary manner, as it did when it entered the commitment order. Objections were not offered by the defendant to the court procedure, but objection was made by him for the first time in this court to the sufficiency of the order.

The point is also made that the alleged statements of John Freeman are not made until he was sworn in the case entitled

People of the State of Illinois v. Irene Breedlove. As to the jurisdiction of the court in the contempt proceeding, this contention is immaterial. This proceeding is one against John Freeman for direct contempt of court, who by his conduct intended to embarrass or obstruct the court in the administration of justice. People v. Gard, supra.

It is contended by the defendant that in the use of the word "perjury" in the order the court overlooked the fact that a trial for perjury must be upon an indictment, and therefore the court erroneously found the defendant guilty of a contempt of court and punishable for false swearing. A somewhat similar question was passed upon by the Appellate Court in O'Neill v. The People, 113 Ill. App. 195, where the court said:

"If the act complained of is a contempt of court, the fact that it may be declared to be a crime by statute does not make it any less a contempt of court, nor does it change the character or nature of the offense, or deprive the court of its inherent right to protect itself by imposing proper punishment therefor."

The order of commitment is sufficient in law, and the court was fully justified in the punishment inflicted upon the defendant for the term fixed in the order. It is therefore affirmed.

ORDER AFFIRMED.

FRIEND AND WILSON, JJ. CONCUR.

People of the State of Illinois v. James Bradshaw, as to the jurisdiction of the court in the contempt proceeding, this contention is immaterial. This proceeding is one between two parties for direct contempt of court, who by his conduct intended to obstruct or defeat the court in the administration of justice. People v. Ward, supra.

It is contended by the defendant that in the use of the word "perjury" in the order the court attacked the fact that a trial for perjury must be upon an indictment, and therefore the court erroneously found the defendant guilty of a contempt of court and punishable for false swearing. A somewhat similar question was passed upon by the Appellate Court in People v. The People, 112 Ill. App. 102, where the court said:

"If the act complained of is a contempt of court, the fact that it may be declared to be a crime by statute does not make it any less a contempt of court, nor does it change the character or nature of the offense, or deprive the court of its inherent right to protect itself by imposing proper punishment therefor."

The order of commitment is sufficient in law, and the court was fully justified in the punishment inflicted upon the defendant for the acts stated in the order. It is therefore affirmed.

ORDER AFFIRMED.

ENTERED AND FILED, 11. 10. 1909.

35279

A. G. GUERRI,

Appellee,

v.

CHICAGO DAILY NEWS, INC., a
corporation,

Appellant.

827
APPEAL FROM

MUNICIPAL COURT

265 I.A. 607²
OF CHICAGO.

Opinion filed March 16, 1932

MR. PRESIDING JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendant from a judgment for \$278.84, entered in the Municipal Court of Chicago, after a trial before the court, in favor of the plaintiff, for damages to his automobile arising out of an accident which occurred on July 18, 1929, at the intersection of Diversey and Oakley Avenues, in Chicago.

The question in this case is largely one of fact, and whether the evidence is sufficient to sustain the judgment entered by the court. In this connection the defendant contends that the plaintiff has the burden of proof to establish that the accident was proximately caused by the negligence of the defendant, and also that the plaintiff was not guilty of negligence contributing to the accident.

In order to determine whether the plaintiff has established his case, as required by this elementary rule of law, it will be necessary to examine the record and decide from the evidence offered by the plaintiff whether he has complied with this rule.

The facts in this case are, substantially, that the plaintiff and the defendant's driver were driving their respective motor cars east on Diversey avenue on the south driveway, and that the accident occurred at Oakley and Diversey Avenues; that Oakley Avenue extends only to Diversey Avenue from the north.

The plaintiff testified that on July 18, 1929, he was driving his Studebaker car, which was only two months old, and

2651.A.607
 OF CHICAGO
 MUNICIPAL COURT
 JUDICIAL DEPT.

JAMES
 A. D. WHEAT
 Appellee
 v.
 GEORGE DEXTER WHEAT, INC., a
 corporation,
 Appellant.

Opinion filed March 16, 1933

MR. PRESIDING JUSTICE REED DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendant from a judgment

for \$27.84 entered in the Municipal Court of Chicago, after a trial before the court, in favor of the plaintiff, for damages to his automobile arising out of an accident which occurred on July 18, 1932, at the intersection of Diversey and Oakley Avenues, in Chicago.

The question in this case is largely one of fact, and whether the evidence is sufficient to establish the defendant entered by the court. In this connection the defendant contends that the plaintiff has the burden of proof to establish that the accident was proximately caused by the negligence of the defendant, and also that the plaintiff was not guilty of negligence contributing to the accident.

In order to determine whether the plaintiff has

established his case, as required by this elementary rule of law, it will be necessary to examine the record and decide from the evidence offered by the plaintiff whether he has complied with this rule.

The facts in this case are, substantially, that the plaintiff and the defendant's driver were driving their respective motor cars on Diversey Avenue on the south driveway, and that the accident occurred at Oakley and Diversey Avenues; that Oakley Avenue extends only to Diversey Avenue from the north.

The plaintiff testified that on July 18, 1932, he was driving his Studebaker car, which was only two months old, and

that the accident occurred one block east of Western Avenue at an unknown intersecting street; that he was traveling in the center of the street and saw the defendant's truck half a block east of Western Avenue, when the defendant's truck was south of his car; that the driver of this truck turned south, which testimony the plaintiff corrected by testifying that the driver turned to the north and did not give a signal of such intention; that at the time, the plaintiff could not stop his car, and the truck and the plaintiff's car collided. The plaintiff testified as to the condition of his car; that it was damaged and that he paid a repair bill of \$278.84.

John W. Watkins, a witness called by the plaintiff, testified that he saw the defendant's truck ten feet from the corner of Oakley and Diversey Avenues; that when it got to the corner it made a swift left turn, and that at the same time he saw the Studebaker coming; that the truck was to the right; that he saw no signal given by the driver of the truck; that he saw the truck turning and then the crash followed; that he expected an accident because he saw the cars close together.

John Tammo, an employee of the defendant, testified that he was driving defendant's truck at 15 or 18 miles an hour; that the traffic was heavy and that he stopped at Oakley Avenue to go north; that a south bound car was coming toward him on Oakley Avenue near the east curb, and on the left side of the street because a furniture truck was standing on the west side of Oakley Avenue 10 or 15 feet from the corner where lumber was being loaded; that he stopped in the center of the intersection, facing slightly northwest, waiting for the south bound car for a period of 25 to 30 seconds when a car struck his truck in the rear; that he signalled with his hand about 20 feet from Oakley Avenue before turning to the left.

Arthur J. Miller, called by the defendant, testified

that the defendant occurred on the east side of Western Avenue at an unknown intersecting street; that he was traveling in the center of the street and saw the defendant's truck half a block east of Western Avenue, then the defendant's truck was south of his car; that the driver of this truck turned south, which testimony the plaintiff corrected by testifying that the driver turned to the north and did not give a signal of such intention; that at the time, the plaintiff could not stop his car, and the truck and the plaintiff's car collided. The plaintiff testified as to the location of his car; that it was damaged and that he paid a repair bill of \$75.00.

John J. Walker, a witness called by the plaintiff, testified that he saw the defendant's truck on foot from the corner of Oakley and Western Avenue; that when it got to the corner it made a swift left turn, and that at the same time he saw the truck coming; that the truck was to the right; that he saw no signal given by the driver of the truck; that he saw the truck turning and then the truck followed; that he crossed an accident because he saw the cars close together.

John Larson, an employee of the defendant, testified that he was driving defendant's truck at 10 or 12 miles an hour; that the traffic was heavy and that he stopped at Oakley Avenue to go north; that a south bound car was coming toward him on Oakley Avenue near the east curb, and on the left side of the street because a furniture truck was standing on the west side of Oakley Avenue 10 or 12 feet from the corner there lumber was being loaded; that he stopped in the center of the intersection, facing slightly northwest, waiting for the south bound car for a period of 25 to 30 seconds when a car struck his truck in the rear; that he collided with his head about 10 feet from Oakley Avenue before turning to the left.

Robert J. Miller, called by the defendant, testified

that he was driving a car south on Oakley Avenue near the east curb; that he was about 150 feet north on Diversy Avenue when he saw the defendant's truck stop in the center of the intersection headed a little to the north; that when he reached the corner he stopped because of traffic, and that when he and the defendant's truck were waiting for each other and for the traffic, the plaintiff's car struck the defendant's car in the rear; that he did not see the defendant's chauffeur give a signal.

While there is contention that the evidence is insufficient to support the plaintiff's claim for damages, it is conclusive that the plaintiff's car was damaged in this accident and there is no evidence that contradicts the plaintiff's as to this fact. The reasonableness of the charges in the repair bill is not contradicted by any evidence offered by the defendant, and we therefore conclude that it was not error to admit the receipted bill of the Studebaker Sales Company for the repairs made upon plaintiff's automobile.

The question before this court is one of fact. The trial court was in a position to observe the demeanor of the witnesses, and in a better position to pass upon their credibility and to pass judgment on the weight of the evidence. This court in a case of this character will not reverse the judgment unless we find from the record that the judgment is against the manifest weight of the evidence. This we are unable to do in the instant case. We, therefore, conclude that the trial court did not err in determining that the plaintiff exercised due care, and that the defendant's driver negligently turned north so closely in front of plaintiff's car at Oakley and Diversy Avenues as to cause the damage to plaintiff's automobile. The judgment is therefore affirmed.

JUDGMENT AFFIRMED.

FRIEND AND WILSON, JJ. CONCUR.

that he was driving a car south on Oakley Avenue near the east curb;

that he was about 150 feet north of Oakley Avenue when he saw the

defendant's car stop in the center of the intersection headed

little to the north; that when he reached the corner he stopped because

of traffic, and that when he and the defendant's car were waiting

for each other and for the traffic, the plaintiff's car struck the

defendant's car in the rear; that he did not see the defendant's

car after it was struck.

While there is contention that the evidence is insufficient

to support the plaintiff's claim for damages, it is conclusive

that the plaintiff's car was damaged in this accident and there is no

evidence that contradicts the plaintiff's claim to this fact. The reason-

ableness of the charges in the report will be not contradicted by any

evidence offered by the defendant, and we therefore conclude that it

was not error to admit the receipt bill of the Studebaker Sales

Company for the repairs made upon plaintiff's automobile.

The question before this court is one of fact. The

trial court was in a position to observe the demeanor of the witnesses,

and in a better position to pass upon their credibility and to pass

judgment on the weight of the evidence. This court in a case of this

character will not reverse the judgment unless we find from the record

that the judgment is against the weight of the evidence. This

we are unable to do in the instant case. We, therefore, conclude that

the trial court did not err in determining that the plaintiff overstated

his case, and that the defendant's driver negligently turned north

so closely in front of plaintiff's car at Oakley and Livermore Avenues

as to cause the damage to plaintiff's automobile. The judgment is

therefore affirmed.

RECORDED.

THOMAS AND SONS, ST. LOUIS.

35701

CHICAGO TITLE & TRUST COMPANY,
as trustee,

Appellee,
v.

MILLIE STICKLER, et al.,
(Defendants)

BROADWAY BRIAR BUILDING CORPORATION,
Appellant.

APPEAL FROM

INTERLOCUTORY ORDER,

SUPERIOR COURT OF
COOK COUNTY.

265 I.A. 607³

Opinion filed March 16, 1932

MR. PRESIDING JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT.

This is an appeal by the Broadway Briar Building Corporation, owner of the premises involved, from an order entered on October 30, 1931, appointing a receiver pendente lite for the property. The complainant, the Chicago Title & Trust Company, filed its bill on October 17, 1931 for a foreclosure of the trust deed therein described, part of the relief prayed for being for the appointment of a receiver.

The bill recites the execution on September 15, 1928, by Millie Stickler and Jacob H. Stickler, her husband, of 404 bonds, aggregating \$170,000, \$4,000 payable in 4 years, 5 years, 6 years and 7 years respectively, \$5,000 in 8 years, and 9 years and \$136,000 in 10 years, with interest at 6% payable semi-annually, and the execution and recording of the trust deed, conveying the real estate therein described to the complainant as trustee, to secure the payment of these bonds.

The bill alleged that a default in the payment of interest amounted to \$3.00, which fell due on March 15, 1930, and interest due on September 15, 1930, in the amount of \$84.00; and of the interest due on March 15, 1931, of \$142. and the interest due on September 15, 1931, of \$48.00; and also default in the payment of the principal amounting to \$3500, and of \$3500. bonds due on

1937

CHICAGO TITLE & TRUST COMPANY,
as Trustee,

Appellee,

v.

MILLIE STEWART, et al.,

(Plaintiffs)

BROADWAY BUILDING COMPANY,
Inc.,

Appellant.

Opinion filed March 16, 1938

MR. JUSTICE BRIDGES delivered the opinion of the court.
This is an appeal from the order of the Circuit Court of Cook County, Illinois, entered on October 10, 1937, sustaining a motion for judgment for the plaintiff. The complaint, the Chicago Title & Trust Company, filed its bill on October 17, 1937 for a foreclosure of the first and third mortgages, part of the relief prayed for being for the appointment of a receiver.

The bill recites the execution on September 12, 1936, by Millie Stewart and Jacob H. Stewart, her husband, of two deeds, reciting \$10,000, \$4,000 payable in 4 years, 3 years, 2 years and 7 years respectively, \$2,000 in 1 year, and 3 years and \$16,000 in 10 years, with interest at 6% payable semi-annually, and the execution and recording of the first deed, conveying the real estate therein described to the complainant as trustee, to secure the payment of said bonds.

The bill alleged that defendant in the payment of interest amounted to \$7.00, which fell due on March 15, 1937, and interest due on September 15, 1937, in the amount of \$24.00; and of the interest due on March 15, 1937, of \$14.00, and the interest due on September 15, 1937, of \$40.00; and also default in the payment of the principal amounting to \$20.00, and of \$20.00 bonds due on

September 15, 1931, by reason of which, the legal holder of one of said bonds has served notice upon the complainant, as such trustee, of his election to declare all of the bonds due and payable, and has requested the complainant to institute proceedings to foreclose the lien of said trust deed.

The provisions of the trust deed as to the rights of the owners and holders of said bonds upon default in the payment of principal or interest, and to having a receiver appointed, are fully set forth in the bill of complaint.

The bill also alleges upon information and belief that the property is inadequate and insufficient security for the protection of the holders of the bonds, and that the present fair, market value of the premises is approximately \$150,000.00.

It is charged in the bill of complaint that the defendant Broadway Briar Building Corporation holds title to the premises; that Millie Stokler and Jacob H. Stokler, her husband, Broadway Briar Building Corporation, Benjamin E. Mittelman and A. Freeman, as Trustees, under a junior trust deed, are made defendants to this bill of complaint.

The bill was verified by A. Edmund Peterson, who says that he is the duly authorized agent of the complainant, and that the allegations of the bill are true to his knowledge and belief, except as to such matters as are alleged upon information and belief, and that as to those matters, he is credibly informed and believes the same to be true.

Summons was made returnable to the November term, and was returned by the sheriff not served on any of the defendants. An order was entered on October 30, 1931, appointing a receiver as prayed for in the bill of complaint, and on November 4, 1931, the court approved the receiver's bond and the complainant's bonds.

September 15, 1931, by reason of which, the legal holder of one of said bonds has served notice upon the complainant, as such trustee, of his election to declare all of the bonds due and payable, and has requested the complainant to institute proceedings to foreclose the lien of said trust deed.

The provisions of the trust deed as to the rights of the owners and holders of said bonds upon default in the payment of principal or interest, and to award a receiver, appointed, are fully set forth in the bill of complaint.

The bill also alleges upon information and belief that the property is inadequate and insufficient security for the redemption of the bonds, and that the present fair market value of the premises is approximately \$150,000.00.

It is charged in the bill of complaint that the defendant and Broadway Real Estate Building Corporation holds title to the premises, that Elsie Stokier and Louis M. Stokier, her husband, Broadway Real Estate Building Corporation, Benjamin F. Witselman and A. Freeman, as trustees, under a junior trust deed, are defendants to this bill of complaint.

The bill was verified by A. Bernard Stokier, who says that he is the duly authorized agent of the complainant, and that the allegations of the bill are true to his knowledge and belief, except as to such matters as are alleged upon information and belief, and that as to those matters, he is credibly informed and believes the same to be true.

Whereupon the same returnable to the November term, and was returned by the sheriff not served on any of the defendants. An order was entered on October 30, 1931, appointing a receiver as prayed for in the bill of complaint, and on November 4, 1931, the court approved the receiver's bond and the complainant's bonds.

The Briar Building Corporation, a defendant and owner of the premises subject to the trust deed being foreclosed, contends that a receiver should not have been appointed ex parte without notice to the defendant to be affected thereby, before it had the opportunity to be heard in relation to its rights.

The receiver was appointed in the case at bar without actual notice to the owner of the premises, or to any of the defendants named in the bill of complaint. It appears from the record that a notice was prepared and directed to the Briar Building Corporation (M. A. Brinker, President), that the complainant would appear before the court on October 30, 1931, and ask that a receiver be appointed for the premises; that the notice was not served, and the reason for failure to serve it is stated in the affidavit of Joseph Budzinaki, which is in effect that on October 29, 1931, affiant attempted to serve the notice upon M. A. Brinker as president of this defendant, at No. 11 South La Salle Street, Chicago, at the last known address of the defendant, but that affiant was unable to find M.A. Brinker at said address; that he made due and diligent inquiry as to the present address of Brinker and was unable to find his address. Affiant is silent as to any effort made by the complainant to serve any of the other officers or agents of this defendant.

It appears from the adjudicated cases that it is a well settled practice to require notice by the moving party to be given to the adverse party of an application for the appointment of a receiver over his property, except in cases of gravest emergency, such as the absconding of the defendant and irreparable injury to the property; and that the rule of practice requiring notice is an inflexible rule which the courts are not at liberty to ignore, except as above stated. English v. The People, 90 Ill. App. 54;

The undersigned is the undersigned, a defendant and owner of the premises subject to the first and second mortgages, contends that a receiver should have been appointed ex parte without notice to the defendant in an alleged hearing, where it had the opportunity to be heard in relation to its rights.

The receiver was appointed in the case at bar without actual notice to the owner of the premises, or to any of the defendants named in the bill of complaint. The record shows that notice was prepared and directed to the other defendant corporation (M. A. Binkley, President), that the complaint would appear before the court on October 20, 1931, and that a receiver be appointed for the premises; that the notice was not served, and the reason for failure to serve it is stated in the affidavit of Joseph Binkley, which is in effect that on October 20, 1931, attempt was made to serve the notice upon M. A. Binkley as president of the defendant, at 2011 South La Salle Street, Chicago, at the last known address of the defendant, but the attempt was unable to find M. A. Binkley at said address, that he made due and diligent inquiry as to the present address of Binkley and was unable to find his address. It is alleged as to any effort made by the complainant to serve any of the other defendants or agents of this defendant.

It appears from the undisputed facts that it is a well settled practice to require notice by the moving party to be given to the adverse party of an application for the appointment of a receiver over his property, except in cases of greatest emergency, such as the dissipation of the defendant and irreparable injury to the property; and that the rule of practice requiring notice is an inflexible rule which the courts are not at liberty to ignore, except as above stated. English v. The People, 30 Ill. App. 541.

Consolidated Stanley Mining & Milling Co. v. Loeber, 96 Ill. App. 128;
Craver & Steele Co. v. Whitman & Barnes Co., 62 Ill. App. 313.

Courts in the appointment of a receiver without notice should proceed with great caution as in doing so they exercise an extraordinary power, which may prove drastic in effect. English v. The People, supra, this court quoted from High on Receivers, Sec. 113, as follows:

"To warrant a court in entertaining an application for a receiver without notice, it must be clearly shown that the delay which would result from giving notice would defeat the rights of plaintiff, or would result in great injury to him. And when the relief is sought upon an ex parte application, upon the ground of extreme necessity, the particular facts and circumstances rendering such summary proceeding necessary should be set forth in the application, and a mere statement of opinion as to such necessity, even though made under oath, will not justify a departure from the established rule requiring notice of the application."

The bill of complaint does not charge facts as a particular ground for the necessity of a summary proceeding to appoint a receiver in this case without notice. To appoint a receiver to deprive the defendant of the possession of its property and the right to collect the rents the defendant should have been served with notice before such order was entered.

The order was erroneously entered by the Chancellor, and for the reasons given in this opinion, it will not be necessary to consider the other questions raised in the record. The order is therefore reversed.

ORDER REVERSED.

FRIEND AND WILSON, JJ. CONCUR.

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...this must be proved from facts on which the Government, as follows:
...which may prove that it is not. Smith v. The People,
...its great action as in doing so they exercise an extraordinary
Court in the appointment of a receiver should be granted

[illegible]

the All of com. int. does not change its

to collect the same the necessary should have been derived with
to derive the defendant of the possession of its property and the right
receiver in this case without notice. To appoint a receiver to
also known for the necessity of a summary proceeding to appoint a

consider the other questions raised in the record. The order is for the removal given in this relation, it will not be necessary to order that the removal be made by the local office, and

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35130

R. M. LABELLE,

Appellant,

v.

GEORGE E. KENNEDY, et al,

Appellees.

84
APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

265 I.A. 607⁴

Opinion filed March 16, 1932

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Plaintiff brought an action in replevin in the Municipal Court of Chicago for furniture, goods, chattels and equipment used in the operation of the Belland Apartment Hotel. The bailiff made return of the writ showing that all of the property mentioned had been levied upon and turned over to plaintiff, except linens and blankets. Plaintiff thereupon filed a statement of claim in trover covering the linens and blankets, to which defendant filed an affidavit of merits denying conversion. Trial was had by the court without a jury. Defendant did not dispute the right of plaintiff to possession of the articles described in the replevin writ except as to 57 ice boxes, 57 stoves and 57 in-a-door beds. Considerable testimony of a conflicting nature was adduced upon trial under the count in trover, the trial court finding for the defendant upon this issue. The assignment of error based upon this finding of the court is not argued in plaintiff's brief, and has apparently been waived upon appeal. Defendants do not here question the right of plaintiff to possession of the articles described in the writ, except the said beds, ice boxes and stoves, and, therefore, the sole question presented for review is whether the court properly found that the last mentioned chattels were the property of the defendant and not of the plaintiff.

The facts as to which there is substantially no dispute, disclose that on December 18, 1928, DeForrest A. Matteson

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and Edward A. Maginnis conveyed by warranty deed to Mary Louise Kennedy, George E. Kennedy and Lulu G. Kennedy, as trustees under the last will and testament of Burr A. Kennedy, deceased, the premises known as the Belland Apartment Hotel in Chicago. The deed contains no reference to appurtenances or fixtures, but conveys only the real estate therein described. The said deed was made pursuant to a contract of exchange entered into between the parties December 1, 1928, wherein Matteson and Maginnis agreed to convey to the Kennedys the premises in question, together with appurtenances thereunto belonging, excepting certain furnishings as stipulated by the following provision of the contract:

"It Is Understood and Agreed between the parties hereto that the furniture in the Belland Apartment Hotel is owned by the parties of the second part (Matteson and Maginnis), and that they have an agreement with a Mr. Dine, tenant of the Hotel, whereby Mr. Dine has purchased the furniture from D. A. Matteson & Co. at a price of \$15,000.00.

It Is Further Understood that said furniture is not included in this contract."

It further appears from the evidence that Joseph M. Dine and Maude, his wife, by chattel mortgage dated October 24, 1928, conveyed to Matteson and Maginnis the furniture, goods, chattels and equipment in said Belland Hotel, specifically scheduled in a typewritten document consisting of 8 or 9 pages attached to the chattel mortgage. The 57 beds, ice boxes and stoves are contained in this typewritten schedule. The foregoing chattel mortgage was duly acknowledged and filed for record in the office of Recorder of Deeds in and for Cook County, Illinois, on October 30, 1928, and duly recorded.

Default having been made in the payment of the notes by Dine and his wife, the chattel mortgagors, Matteson and Maginnis, foreclosed the chattel mortgage after the real estate had been conveyed to the Kennedys, and bid the chattels in at the sale. Subse-

excepting certain furnishings as indicated by the following explanation of the contents:

premises in question, so other than the furniture belonging thereto. Wherein mention was made of money to the Kennedy's street exchange entered into between the parties December 1, 1938, estate therein described. The said deed was made pursuant to a reference to circumstances or fixtures, but conveyed only the real known as the Hotel Paramount Hotel in Chicago. The deed contained the last will and testament of Mary A. Kennedy, deceased, the premises Kennedy, George J. Kennedy and John A. Kennedy, as trustees under and Edward A. Kennedy conveyed by warranty deed to Mary Louise

It is understood that said furniture is not included in this contract.

in and for Cook County, Illinois, on October 20, 1932, and duly
recorded and filed for record in the office of Recorder of Deeds
typewritten schedule. The foregoing stated mortgage was duly
mortgage. The 24 beds, two bunks and stoves are contained in this
written document consisting of 3 or 4 pages attached to the chattel
component in said hotel, specifically scheduled in a type-
conveyed to Peterson and Lorraine B. Lunnine, Goods, fixtures and
time and date, was witnessed by Charles Montgomery dated October 24, 1932,
it further appears from the evidence that Joseph W.

by him and his wife, the official mortgage, Peterson and his wife, foreclosed the estate mortgage after the real estate had been conveyed to the mortgage, and did the same in the sale. The

quently, on January 9, 1930, Matteson and Maginnis sold said furniture, goods and chattels to one Harry Weinstein, who executed a chattel mortgage covering the identical property mentioned in the Dine chattel mortgage, and caused the Weinstein mortgage to be duly acknowledged and recorded in the Recorder's Office of Cook County, Illinois, on January 14, 1930.

Weinstein likewise defaulted in the payment of the chattel mortgage notes executed by him, and on March 19, 1930, Matteson and Maginnis gave notice of sale, and thereafter on March 22, 1930, sold to R. M. LaBelle, plaintiff, for the sum of \$6,000, the property mentioned in the chattel mortgage.

From the foregoing facts in evidence, it appears that when Matteson and Maginnis sold the real estate in question to the Kennedys in December, 1928, they stipulated in the contract of exchange that the furniture in the Hotel had been sold to Dine for \$15,000, and was, therefore, not included in the exchange with the Kennedys. Plaintiff insists that this agreement put the Kennedys upon notice as to the name of the tenant, as well as the name of the owner of the furniture in the hotel, by reason whereof it became the Kennedys' duty to ascertain whether there was any chattel mortgage upon the furniture, goods and chattels or equipment in the hotel, and that if they had made any inquiries, or examined the public records, they would have ascertained that the Dine chattel mortgage, which included the 57 beds, stoves and ice boxes, was a matter of record and preceded in point of time the conveyance of the real estate to the Kennedys. In support of his position, plaintiff cites the case of Sword v. Low, 122 Ill. 487, wherein the court discusses at length the duty imposed upon purchasers of real estate to ascertain by an examination of the records whether articles apparently attached to the soil as permanent fixtures are subject to liens as

personalty, and concludes that there is such a duty. In the course of its opinion, the court said:

"The later authorities have relaxed the rule of law, and have done so in consideration of the public convenience, and in the interest of trade and commerce. And while it may be objected that under this ruling the examination of title to realty will necessarily involve the examination of the chattel mortgage record, to determine whether articles apparently attached to the soil as permanent fixtures are subject to liens as personalty, we can see no hardship in holding that as to articles which necessarily retain their individual characteristics after being annexed to the soil, and which may or may not be fixtures, and which it is apparent may be removed without material injury to the freehold, the purchaser or incumbrancer of the realty will be required to take notice of what is apparent upon the public record. It will not be questioned that he would be required to take notice of judgment liens, although not apparent upon the land record. So, also of tax liens, although the same are not apparent upon the land record, nor kept in the office of the recorder of deeds. Here, the character of the property was such, that before it could be put to use it must necessarily be placed upon and so attached to the land as that it might, and would, if so intended, become a fixture. The parties had done everything in their power, by a compliance with the statutes of the State, to preserve this lien. If the lien may not thus be preserved, no one could buy, on time, property which may become a fixture, and secure the purchase money by a chattel mortgage thereon, for so soon as it is put into use the lien of the mortgage would be extinguished."

This court, in the case of Andrews v. Chandler, 27 Ill.

App. 103, relying upon the authority of Sword v. Low, supra, subsequently held that several hundred opera chairs which were screwed to and attached to the floor of a theater, were chattels reserved by mortgage, and not part of the realty, and that the chattel mortgage was valid as against subsequent purchasers or mortgagees of the real estate.

Defendants seek to distinguish the case of Sword v. Low

by pointing out that the purchaser of the real estate there had actual knowledge that the chattels were covered by a mortgage, whereas in the case at bar they say that no actual notice of adverse ownership was given to the Kennedys. It will be observed, however, that the contract of exchange heretofore referred to between Matteson and Maginnis on the one hand, and the Kennedys on the other, expressly

personality, and concludes that there is such a duty. In the course of its opinion, the court said:

"The later authorities have relaxed the rule of law, and have done so in consideration of the public convenience, and in the interest of trade and commerce. And this is why it is objected that under this rule the examination of title to realty will necessarily involve the examination of the chattel mortgage record, to determine whether articles separately attached to the soil as permanent fixtures are subject to liens as personality, we can see no hardship in holding that as to articles which necessarily remain their individual character after being annexed to the soil, and which may or may not be fixtures, and which it is apparent may be removed without a vital injury to the freehold, the purchaser or incumbrancer of the realty will be required to take notice of that is apparent upon the public record. It will not be questioned that he would be required to take notice of judgments liens, although not apparent upon the land record. So, also of tax liens, although the same are not apparent upon the land record, nor kept in the office of the recorder of deeds. Here, the character of the property is such, that before it could be put to use it must necessarily be annexed to the land so that it might, and would, if so annexed, become a fixture. The parties had done everything in their power, by a compliance with the statutes of the State, to preserve this lien. If the lien may not thus be preserved, no one could buy, on time, property which may become a fixture, and secure the purchase money by a chattel mortgage in return, for as soon as it is put into use the lien of the mortgage would be extinguished."

This court, in the case of Adkins v. Franklin, 27 Ill.

103, relying upon the authority of Wood v. Low, subsequently held that several painted signs which were removed and attached to the front of a theater, were chattels reserved by mortgage, and not part of the realty, and that the chattel mortgage was valid as against subsequent purchasers or mortgagees of the real estate.

Plaintiffs seek to distinguish the case of Wood v. Low

by pointing out that the purchaser of the realty there had actual knowledge that the chattels were covered by a mortgage, whereas in the case at bar they say that no actual notice of adverse ownership was given to the Kennedy's. It will be observed, however, that the contract of exchange herebefore referred to between Jackson and McAnis on the one hand, and the Kennedy on the other, expressly

stated that the furniture in the hotel was owned by Matteson and Maginnis, and that they had an agreement with Dine, tenant of the Hotel, for the purchase of the furniture from them at a stipulated price of \$15,000, and the agreement expressly states that "said furniture is not included in this contract." This we believe was sufficient notice to the Kennedys that some of the equipment described as "furniture" within the hotel was expressly excluded from the conveyance of the real estate by warranty deed. Having thus been put upon notice, it was incumbent upon the Kennedys to make inquiries or examine the public records, from which it could easily have been ascertained that the specific articles here in controversy were the subject of a chattel mortgage, and failing to pursue the inquiry, we believe they cannot now claim the chattel as being part of the realty.

Defendants argue that the vendors of the property had full opportunity to protect their interests by expressly reserving the chattels in question to themselves on the face of the deed to the Kennedys. We cannot agree with this contention, however. The warranty deed was a conveyance of real estate and not of personal property, and it was not incumbent upon Matteson and Maginnis to make reservations of personal property in the deed conveying real estate.

There is another reason, however, why these chattels should have been awarded to plaintiff. On January 9, 1930, the Kennedys executed a lease of the hotel in question to Weinstein, who had executed a chattel mortgage on the same date to Matteson and Maginnis. In a rider attached to said lease, the following appears over the signature of the Kennedys and Weinstein:

"It is understood that said lessees have purchased from DeForrest A. Matteson and Edward A. Maginnis the furniture, carpets, drapes, curtains, furnishings and other equipment, goods and chattels in said Hotel, and that they have given unto said DeForrest A. Matteson and Edward A. Maginnis a Chattel Mortgage bearing even date herewith upon said furniture, carpets, drapes, curtains, furnishings and other equipment, goods and chattels and the leasehold of said premises, to secure a promissory note or notes evidencing a part of the

stated that the furniture in the hotel was owned by Kennedy and
Kennedy, and that they had an agreement with him, tenant of the
hotel, for the purchase of the furniture from him at a stipulated
price of \$10,000, and the agreement expressly stated that "said
furniture is not included in said contract." This we believe was
sufficient notice to the Kennedy that some of the furniture was
owned by Kennedy, and that the hotel was not to be taken from the non-
reversion of the real estate by Kennedy's death. Having thus been put
upon notice, it was incumbent upon the Kennedy to make inquiries or
examine the public records, from which it could easily have been
ascertained that the specific articles were in controversy were the
subject of a chattel mortgage, and failing to make the inquiry, we
believe they cannot now claim the chattel as being part of the realty.
Calenderson agrees that the vendors of the property had
full authority to put at their disposal by express reservation
the chattels in question to themselves on the day of the deed to the
Kennedy. We cannot agree with this contention, however. The
written deed was a conveyance of real estate and not of personal prop-
erty, and it was not incumbent upon the Kennedy and his heirs to make
reservations of personal property in the deed conveying real estate.
There is another reason, however, why these chattels
should have been reserved to the Kennedy. On January 4, 1930, the
Kennedy executed a lease of the hotel in question to the Kennedy, who
had executed a chattel mortgage on the same date to the Kennedy and
his heirs. In a rider attached to said lease, the following appears
over the signature of the Kennedy and his heirs:

"It is understood that said lease has been purchased
from the Kennedy and his heirs and that the Kennedy the furni-
ture, carpets, drapes, curtains, furnishings and other equip-
ment, goods and chattels in said hotel, and that they have
given unto said Kennedy and his heirs and the Kennedy and his heirs
a chattel mortgage bearing even date herewith upon said furni-
ture, carpets, drapes, curtains, furnishings and other equip-
ment, goods and chattels and the household of said premises,
to secure a promissory note or notes evidencing a part of the

purchase price of said furniture, goods, chattels and equipment.

It is further agreed that in case the holder or holders of such chattel mortgage foreclose upon the same because of any default in the terms thereof and sell said goods, chattels and leasehold under the terms of such Chattel Mortgage, the purchaser at any such Chattel Mortgage Sale shall have the right to pay the rent due under the terms of said lease without any obligation on their part requiring them to so pay said debt.

Witness the hands and seals of the said lessors and lessees this 9th day of January, 1930."

Signed and sealed by the parties.

By this document, the Kennedys apparently recognized the chattel mortgage that was subsequently foreclosed and the goods covered thereby which were sold to plaintiff. An inspection of the chattel mortgage discloses that the beds, ice boxes and stoves in question were specifically mentioned. If there could be any question as to the validity of plaintiff's first contention, we believe that the Kennedys, by the foregoing agreement attached to the lease, recognized the Weinstein chattel mortgage, which covered all the equipment in the hotel, and thereby estopped themselves from claiming that these chattels were attached to or a part of the realty.

The trial court was evidently of the opinion that the chattels in question were attached to and a party of the realty and made its findings solely on that issue. Counsel by their briefs, devote a considerable part of their argument to this question. However, in view of our conclusion that the Kennedys had notice when they purchased the property that certain furniture was reserved to the grantors, and also because they recognized the chattels as separate from the real estate under the Weinstein lease, we deem it unnecessary to determine the question whether the specific chattels in controversy were fixtures or furniture.

For the reasons stated herein, the judgment of the Municipal Court will be reversed and remanded with instructions to enter a judgment, finding the right to the possession of all the property described in the replevin writ in plaintiff.

REVERSED AND REMANDED WITH INSTRUCTIONS.

HEBEL, P.J. AND WILSON, J. CONCUR.

persons other than the mortgagor, and the mortgagee.

It is further stated that in case the holder or holders of such chattel mortgage mortgage upon the same become of any estate in the land above and will said mortgage, on their and interest under the terms of such mortgage, the mortgagee or any such chattel mortgagee shall have the right to pay the debt due under the terms of such mortgage without any obligation on their part to pay any interest.

Witness the hands and seals of the said mortgagee and mortgagee this 10th day of January, 1930.

Witness and sealed by the mortgagee.

By this document, the mortgagee has been recorded.

The chattel mortgage that was subsequently foreclosed and the proceeds thereof which were sold to plaintiff. An inspection of the

chattel mortgage discloses that the bags, tea boxes and stoves in

question were specifically mentioned. It there could be any question

as to the validity of plaintiff's first contention, we believe that

the mortgage, by the first and second mortgages, attached to the land, mortgagee

owned the chattel mortgage, which covered all the equipment

in the hotel, and thereby attached themselves from claiming that these

chattels were attached to as part of the mortgage.

The trial court was evidently of the opinion that the

chattels in question were attached to and a part of the mortgage and

made its findings solely on that issue. Counsel by their briefs,

devote a considerable part of their argument to this question. Now-

ever, in view of our conclusion that the mortgagee had notice when

they purchased the property that certain furniture was reserved to

the mortgagee, and also because they knew that the chattels as referred

to from the first mortgage under the chattel mortgage, we deem it unnecessary to determine the question whether the specific chattels in

controversy were fixtures or chattels.

For the reasons stated herein, the judgment of the

trial court will be reversed and remanded with instructions to

enter a judgment, leaving the right to the possession of all the

property involved in the mortgage to the plaintiff.

WITNESSED AND SIGNED this 10th day of January, 1930.

35139

A. R. PRICE and S. PRICE,
(Plaintiffs) Appellees,

v.

SOUTH SHORE STATE BANK, a
Corporation,

(Defendant) Appellee,

On Appeal of
NINIAN H. WELCH and SOL A. HOFFMAN,
(Petitioners) Appellants.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

265 I.A. 607⁵

Opinion filed March 16, 1932

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

A. R. Price and S. Price, as plaintiffs, recovered judgment in the Municipal Court of Chicago against the South Shore State Bank for \$3907.00 and costs. Ninian H. Welch and Sol A. Hoffman, as attorneys for plaintiffs, filed their petition in the same proceeding to enforce their lien for attorneys fees upon the said judgment. Plaintiffs filed their answer to the petition and upon the issues thus joined the court heard the cause without a jury and allowed petitioners the sum of \$550.00 attorneys fees and also \$75.00 for expenses, which item is not contested in this proceeding. Petitioners have prosecuted this appeal from the judgment thus entered, contending that they are entitled to \$1,500.00 for their services.

Briefly stated, the petition alleges that Welch and Hoffman were retained by plaintiffs to prosecute and collect a claim against the South Shore State Bank; that no definite, fixed or certain fee was agreed upon, but that a reasonable charge was to be made for their legal services; that the payment of any fee was contingent on the success of the litigation or upon the collection or compromise of plaintiffs' claim; that petitioners rendered valuable services in prosecuting the claim to judgment; that \$1,500.00 was a fair and reasonable fee for their services.

It is not responsible for their behavior.

Plaintiffs' answer denied having retained Welch as their attorney, but averred that they had retained Hoffman and agreed to pay him \$150.00 as a fee for all services rendered and to be rendered in said cause, and that said fee was not contingent but was to be paid at all events.

The court found that the statutory requirements relating to attorneys liens (Cahills Illinois Revised Statutes, Chapter 13, Section 13) had been fully complied with; that plaintiffs had retained both petitioners, Welch and Hoffman, to represent them; that no agreement had been made for the payment of \$150.00 to cover all services rendered; that no definite, fixed or certain fee had been agreed upon, and that petitioners were entitled to receive a reasonable fee for their services, which was found by the court to be \$550.00.

As grounds for reversal, petitioners urge (1) that no traverse having been made by plaintiffs' answer of the allegation that \$1,500 was a reasonable fee, the allegation therefore stands admitted; and (2) that the evidence sustains the averment of the petition that the services were reasonably worth \$1,500.00.

There is no force to petitioners' first contention. Under the pleadings, the sole issue presented for determination was the amount to which petitioners were entitled for their legal services. The court having first found that no definite sum had been agreed upon between the parties, was required to fix a sum that would reasonably compensate petitioners for their services. Upon this question considerable evidence was adduced. Petitioners offered their own evidence and that of an attorney, all of whom stated that in their opinion substantially one third of the amount recovered by plaintiffs in the main litigation would be reasonable compensation for services of this character. Plaintiffs offered the evidence of

Plaintiffs' answer denied having retained said as their attorney, but averred that they had retained Nathan and Gross to pay him \$100.00 as a fee for all services rendered and to be rendered in said case, and that said fee was not contingent but was to be paid at all events.

The court found that the statutory requirements relating to attorney's liens (Illinois Revised Statutes, Chapter 13, Section 18) had been fully complied with; that plaintiffs had retained both petitioners, Nathan and Gross, to represent them; that no agreement had been made for the payment of \$100.00 to cover all services rendered; that no definite, fixed or certain fee had been agreed upon, and that petitioners were entitled to receive a reasonable fee for their services, which was found by the court to be \$200.00.

It is found for reversal, petitioners urge (1) that no traverse having been made by plaintiffs' answer of the allegation that \$100 was a reasonable fee, the allegation operates as an admission; and (2) that the evidence sustains the averment of the petition that the services were reasonably worth \$100.00. There is no force to petitioners' first contention. Under the pleadings, the sole issue presented for determination was the amount to which petitioners were entitled for their legal services. The court having first found that no definite sum had been agreed upon between the parties, was required to fix a sum that would reasonably compensate petitioners for their services. Upon this question considerable evidence was adduced. Petitioners offered their own evidence and that of an attorney, all of whom stated that in their opinion substantially one third of the amount recovered by plaintiffs in the main litigation would be reasonable compensation for services of said attorneys. Plaintiffs offered the evidence of

two other attorneys, one of whom represented the defendants in the main action, and their estimate of a fair and reasonable value of petitioners' services was placed at approximately \$400.00. It appears that the opinions of the petitioners and their witness were based upon the statement of the questions and issues involved in the main litigation and the consequent necessity for consulting authorities and holding consultations with reference thereto. It appears to us, however, that there were only two real questions involved in the law suit; one was whether a signature had been forged to a check, and the second was whether the signature, even though forged, was afterward ratified by the acts and conduct of the person purported to have signed the check. It is sometimes difficult to ascertain the value of legal services, especially where the testimony is conflicting. In so doing it is proper for the court to take into consideration the professional skill and standing of the persons employed, the nature of the controversy, both with regard to the amount involved and the questions raised, as well as the result of the litigation. Evidence was adduced by both sides on these various questions and the court was in a position to determine what amount should be allowed to petitioners as a fair and reasonable fee for their services. We have examined the abstract of record carefully, and are not disposed to disturb the court's findings as being contrary to the manifest weight of the evidence.

There being no other assignment of error, the judgment of the Municipal Court will be affirmed.

AFFIRMED.

HEBEL, P.J. AND WILSON, J. CONCUR.

two other attorneys, one of whom represented the defendants in the
main action, and their estimate of a fair and reasonable value of
petitioners' services was placed at approximately \$400.00. It
appears that the opinions of the petitioners and their witnesses were
based upon the statement of the defendant and issues involved in
the main litigation and the defendant's position for consideration
authorities and holding of precedents with reference thereto. It
appears to me, however, that there were only two real questions in-
volved in the law suit; one was whether a signature had been forged
to a check, and the second was whether the signature, even though
forged, was afterwards ratified by the acts and conduct of the person
purported to have signed the check. It is sometimes difficult to as-
sert in the value of legal services, especially where the testimony
is conflicting. In no case is it proper for the court to take into
consideration the professional skill and standing of the persons
employed, the nature of the controversy, with respect to the amount
involved and the questions raised, as well as the results of the lit-
igation. Evidence was adduced by both sides on these various questions
and the court was in a position to determine what amount should be
allowed to petitioners as a fair and reasonable fee for their services.
We have examined the abstract of record carefully, and are not dis-
posed to disturb the court's findings as being contrary to the weight
of the evidence.

There being no other assignment of error, the judgment
of the municipal court will be affirmed.

AFFIRMED.

WHEEL, J. J. and ALLEN, J. C. JJ.

35160

J. WASSERMAN and A. MILLNER,
doing business as WASSERMAN
& MILLNER,

Appellants,

v,

MRS. ANNA MULVANEY, also known
as A. E. MULVANEY

Appellee.

7 86
APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

265 I.A. 608^L

Opinion filed March 16, 1932

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

A judgment by confession was entered in favor of plaintiffs and against defendant in the Municipal Court of Chicago for \$82.25, consisting of \$65.00 rent for the month of May, 1930, alleged to be due under a written indenture of lease entered into between the parties, and \$17.50 as attorney's fees.

Shortly thereafter defendant filed a motion to open the judgment, supported by her affidavit, admitting the execution of the lease, the term, and the rental stipulated in the lease, and alleging that plaintiffs refused to deliver possession of the demised premises. The court opened the judgment, giving defendant leave to appear and defend.

Upon the hearing defendant testified that when she sought to move in the premises, which was an apartment in plaintiffs' building, she found the same occupied by another tenant; that plaintiffs' agent told her he could do nothing about it, and could give her no promise as to when she might obtain possession; that she went to the demised apartment two or three times between May 1, 1930, the first day of the term, and May 7, 1930, and on the latter date, being unable to obtain possession, moved out of the building into other quarters.

John Kruze, another of defendant's witnesses, testified that he lived with defendant and was present on May 1st and 3rd when

1. DANIELSON and A. MINER,
doing business as DANIELSON
& MINER,

Appellants,

v.

Wm. A. E. MINER, also known
as A. E. MINER

Appellee.

265 I.A. 008

Opinion filed March 16, 1932

MR. JUSTICE FIELD delivered the opinion of the court.

A judgment by confession was entered in favor of plaintiffs and against defendant in the United States District Court for the District of Columbia, for \$27.25, consisting of \$25.00 rent for the month of May, 1931, alleged to be due under a written lease of space covered into between the parties, and \$2.25 as attorney's fees. Shortly thereafter defendant filed a motion to open the judgment, supported by her affidavit, setting out the execution of the lease, the term, and the rental stipulated in the lease, and alleging that plaintiff's refusal to deliver possession of the premises. The court entered the judgment, giving defendant leave to answer and defend.

Upon the motion defendant testified that when she sought to move in the premises, which was an apartment in plaintiff's building, she found the same occupied by another tenant; that plaintiff's agent told her he would be notified about it, and could give her no promise as to when she might obtain possession; that she went to the desired apartment two or three times between May 1, 1931, the first day of the term, and May 7, 1931, and on the latter date, being unable to obtain possession, moved out of the building into other quarters.

John Evans, another of defendant's witnesses, testified that he lived with defendant and was present on May 1st and 2nd when

defendant tried to get possession of the demised premises, but could not do so, because other tenants were living in the apartment at the time, and the door thereto was locked so that defendant could not enter.

Mary Kruze corroborated her husband's testimony and that of defendant by stating that she also was present on the two dates mentioned when defendant sought to gain possession, but could not because the demised premises were still occupied.

One Picard, a witness for plaintiffs, testified that a week prior to May 1st he advised defendant that he could not give her the exact date when she could move into the premises, because the former tenants had not vacated; that the tenants then in possession moved out about May 3rd, and he so advised defendant but she refused to move into the apartment at that time because it was dirty.

Plaintiffs contend that although Picard had not completed his testimony, and although plaintiffs had other witnesses and other evidence to present, the trial court refused to hear further evidence, but made a finding for defendant.

Several points are raised by plaintiffs' brief, but the controlling question is whether under the evidence presented, defendant, as lessee, is liable for the payment of rent under the covenant of the written instrument. It is conceded that defendant entered into the lease in question, and agreed to pay the stipulated rental for the demised premises at the rate of \$85.00 per month beginning May 1, 1930. Defendant's only excuse is that the tenant then in possession, whose term had expired, held over without right, and that being unable to obtain possession on May 1st, the first day of the term, and for several days thereafter, defendant was justified in refusing to enter and became absolved from the obligation to pay rent under the written indenture of lease. It appears to be undisputed that plaintiffs were willing to allow defendant to continue to occupy

defendant tried to get possession of the desired premises, but could not do so, because as he testified was living in the apartment at the time, and the lock there was locked so that defendant could not enter.

Many times corroborated her husband's testimony and that of defendant by stating that she also was present on the two dates mentioned when defendant sought to gain possession, but could not because the desired premises were still occupied.

One record, a witness for plaintiff, testified that a week prior to my last evidence defendant told her that he could not give her the exact date when she could move into the premises, because the former tenants had not vacated; that the tenants were in possession moved out about May 3rd, and he as advised defendant but she refused to move into the apartment at that time because it was dirty.

Plaintiff contended that although record had not completed his testimony, and likewise, plaintiff had other witnesses and other evidence to present, the trial court refused to hear further evidence, but made a finding for defendant.

Several points were raised by plaintiff's brief, but the controlling question is whether under the evidence presented, defendant, as lessee, is liable for the payment of rent under the covenant of the written instrument. It is contended to a defendant entered into the lease in question, and agreed to pay the stipulated rental for the desired premises at the rate of \$25.00 per month beginning May 1, 1930. Defendant's only excuse is that the tenants, then in possession, whose term had expired, held over without right, and that being unable to obtain possession on my last, the first day of the term, and for several days thereafter, defendant was justified in refusing to enter and become obligated from the obligation to pay rent under the written instrument of lease. It appears to be undisputed that plaintiff were willing to allow defendant to continue to occupy

another apartment in the same building where she then resided and had resided for some time prior to May 1st, until such time as possession of the demised premises could be obtained, but defendant was apparently unwilling to do this.

Under the settled rule in this state, the covenant for quiet enjoyment under a lease means only that the lessor shall have such title to the premises as will enable him to give a good, unencumbered lease for the term demised. It implies no warranty against the act of strangers. Such a covenant is understood to confer upon the lessee a right to enter upon the premises, but nothing more, and has never been construed to embrace an obligation on the part of the lessor to place the lessee in possession of the premises. Therefore, if the party holding over is a mere wrong-doer, as in the instant case, the right of the lessee after the date fixed for commencement of the tenancy is as effectual to dispossess him as was that of the landlord; in fact, the landlord is not entitled to possession and can maintain no action to recover the premises, the right of immediate possession being in the lessee alone, and he must bring the action. It was so held in the early leading case of Gazzolo v. Chambers, 73 Ill. 75, and followed by later authorities. Muller v. Bernstein, 183 Ill. App. 154; Palmer v. Young, 108 Ill. App. 252; Field v. Herrick, 101 Ill. 110.

The court should, of course, have allowed plaintiffs to adduce such further testimony as they had without interrupting the procedure when plaintiffs' first witness had testified only in part, but even according to defendant's own evidence, we believe the trial court was not justified in finding the issues for defendant under the rule of law applicable to the case. Plaintiffs had made a prima facie case by showing the execution of the lease, the commencement of the term and the maturity of the rent, all of which facts are admitted by defendant, both in her petition and in her

another apartment in the same building where she then resided and had resided for some time prior to May 1st, until such time as possession of the leased premises could be obtained, but defendant was apparently unwilling to do this.

Under the settled rule in this state, the covenant for quiet enjoyment under a lease means only that the lessor shall have such title to the premises as will enable him to give a good, unencumbered lease for the term desired. It implies no warranty against the act of strangers. Such a covenant is understood to confer upon the lessee a right to enter upon the premises, but nothing more, and has never been construed to embrace an obligation on the part of the lessor to place the lessee in possession of the premises. Therefore, if the party holding over is a mere wrong-doer, as in the instant case, the right of the lessee after the date fixed for commencement of the tenancy is as effective to dispossess him as was that of the landlord; in fact, the landlord is not entitled to possession and can maintain no action to recover the premises, the right of immediate possession being in the lessee alone, and he must bring the action. It was so held in the early leading case of Garzolo v. Garzolo, 73 Ill. 73, and followed by later authorities. Miller v. Patterson, 135 Ill. App. 124; Miller v. Johnson, 102 Ill. App. 223; Field v. Herrick, 101 Ill. 110.

The court should, of course, have allowed plaintiff to adduce such further testimony as they had without interrupting the procedure when plaintiff's first witness had testified only in part, but even according to defendant's own evidence, we believe the trial court was not justified in finding the lessee for defendant under the rule of law applicable to the case. Plaintiff had made a prima facie case by showing the execution of the lease, the commencement of the term and the maturity of the rent, all of which facts are admitted by defendant, both in her petition and in her

testimony before the court. The defense was of an affirmative nature, and the burden, therefore, rested upon her to show that possession was withheld through some fault of plaintiffs. This the evidence utterly fails to disclose, and the court should, therefore, have allowed the judgment as originally entered in favor of plaintiffs to stand in full force and effect.

For the reasons stated, the judgment of the lower court will be reversed with directions to expunge from the record the judgment entered and to allow the judgment as originally entered to stand.

REVERSED AND REMANDED WITH DIRECTIONS.

HEBEL, P.J. AND WILSON, J. CONCUR.

the judgment entered and as also the judgment as originally entered will be reversed with directions to award the proper relief for the reasons stated, the judgment of the lower court to stand in full force and effect.

35202

PEOPLE OF THE STATE OF ILLINOIS,

Defendant in Error,

v.

LAW GOW,

Plaintiff in Error.

877
ERROR TO THE

MUNICIPAL COURT

OF CHICAGO

265 I.A. 608²

Opinion filed March 16, 1932

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

The defendant, Lou Gow, was convicted in the Municipal Court of Chicago of willful and malicious assault with a deadly weapon upon one Frank C. Loi, in violation of the statute. The cause was tried by the court pursuant to a waiver of trial by jury, resulting in a sentence to the House of Correction for one year.

It is first urged as grounds for reversal that there is a fatal variance between the information and the proof. The information designates the person charged with the crime as Law Gow and not Lou Gow, which is the name given by the defendant. The defendant is of Chinese ancestry, and his counsel earnestly contends that the court should take judicial notice of the fact that the name of a man of Chinese ancestry consists regularly of his patronymic or family name first, to which is appended the other name or names which serve to distinguish him from the other members of his particular family; that the patronymic of the defendant in this case is Lou and not Law, as stated in the information, and therefore the doctrine of idem sonans does not apply. The only case cited in support of the contention as to a variance is Million v. People, 6 Ill. App. 537, where defendant was indicted for an assault upon one Frank Blackburn with intent to commit murder. The jury returned a verdict finding him guilty of an assault upon the person of Edward Blackburn. The court stated that the variance was fatal and reversed a judgment of conviction entered by the trial court.

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Opinion filed March 16, 1932

[illegible]

The record in the instant case does not disclose that the name of the defendant was spelled by any witness, including the defendant himself, and we are therefore unable to determine whether his name is correctly spelled as Law or Lou. However, there is only a slight variance in the spelling, and we are of the opinion that the principle of idem sonans, applies. Recent decisions of our Supreme Court seem to sustain this conclusion. In People v. Gormagh, 303 Ill. 332, an indictment for murder alleged that defendant's name was Weinstrub, whereas, the proof showed his name to be Weintrub. The court held that the variance was not fatal, inasmuch as the two spellings have substantially the same pronunciation so that the defendant could not be misled in preparing his defense. In People v. Ziderowski, 325 Ill. 232, prosecution was had for robbery. The indictment recited the name of the person robbed as Lonson while the record showed his name to be Lunson. The court held that this variance was not fatal. In People v. Jacobson, 178 Ill. App. 313, it was held that a variance between the name Elsa Mills and Elga Mills was not fatal. The court in its opinion said:

"The modern rule is, that the variance as to names alleged in an indictment and approved by the evidence is not to be regarded as material, unless it shall be made to appear to the court that the jury was misled by it or that some substantial injury was done to the accused thereby, such as, that by reason thereof he was unable to intelligently make his defense, or was exposed to the danger of a second trial on the same charge."

We believe the foregoing decisions correctly state the rule in this state. Moreover, the question of variance between the information and the proof was not in any manner raised in the trial court, and therefore cannot be raised on review. It was so held in People v. Ascey, 304 Ill. 404, and People v. Weisman, 296 Ill. 156, wherein the court said:

"If there was, in fact, such a variance, it is but fair to the parties and to the court trying the case that such objections should be made on the trial in the court below, and there is, therefore, no force in this objection."

below, and there is, therefore, no force in this objection.
each objection should be made on the trial in the court
to the parties and to the court trying the case that
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said:

304 Ill. 404, and People v. Kaiman, 303 Ill. 126, wherein the court
fore cannot be relied on review. It can be held in People v. Kaiman,
the proof was not in any manner raised in the trial court, and there-
fore, moreover, the question of variance between the information and
to believe the foregoing statement correctly states the rule in this
a second trial on the same charge."
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such as, that by reason thereof he was unable to intellig-
some substantial injury was done to the accused thereby,
appear to the court that the jury was misled by it or that
not to be regarded as material, which it shall be made to
alleged in an indictment and approved by the evidence is
"The modern rule is, that the variance as to names
fatal. The court in its opinion said:
that a variance between the name Elias White and J. C. White was not
was not fatal. In People v. J. C. White, 175 Ill. 401, 413, it was held
record showed his name to be Lawson. The court held that this variance
statement recited the name of the person named as Lawson while the
liberty, 328 Ill. 328, prosecution was held for robbery. The in-
defendant could not be aided in proving his defense. In People v.
spellings have substantially the same pronunciation so that the
court held that the variance was not fatal, inasmuch as the two
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principle of idem sonans, applies. Recent decisions of our Supreme
variance in the spelling, and we are of the opinion that the
is correctly spelled as law or lawn. However, there is only a slight
himself, and we are therefore unable to determine whether his name
the defendant was spelled by any witness, including the defendant
the record in the instant case does not disclose that the name of

It is next urged that from a consideration of the whole evidence there appears a reasonable doubt as to the defendant's guilt, and therefore the judgment of conviction should not have been entered against him. The state's case was presented by the testimony of three witnesses. Frank G. Loi, complaining witness, testified that on June 4, 1930, while standing in front of the Oak Tong Association, 3109 Archer Avenue, in Chicago, he saw the defendant, Lou Gow, driving a car. Loi was standing on the sidewalk on the south side of the street, and Ohing Sing and John Lee were with him. As he stood there, the car passed by him and stopped. Jew Fook came out of the car and started shooting. Lou Gow also came out and drew a revolver. Lou Gow was the driver of the car. The witness stated he saw three revolvers. He heard a gun fire as he ran up to the second floor of the building and then heard four or five other shots. On subsequent examination he discovered three bullet holes through the door and one through a glass window. Nobody was struck by the bullets. On cross-examination Loi testified that Jew Fook fired first and he did not know who fired the other shots. He stated Jew Fook got out of the automobile first and then Lou Gow came out and pulled a gun. All of the occurrences testified to took place about 9 o'clock at night, and before it was entirely dark.

Officer Frank Brady, another witness for the state, testified he found a couple of bullet holes at 3109 Archer Avenue that looked to him like fresh holes. Upon information furnished him, Brady went to the Metropole Hotel, where defendant resided, and Brady waited until he came home. The officer arrived at the hotel at about 9:45 and the defendant came home at about 11:30 p.m. Upon arriving at the hotel, defendant told the officer that he had just been downtown. Later that night at the Detective Bureau he said he had been

It is now noted that from a consideration of the whole evidence there appears a reasonable doubt as to the defendant's guilt, and therefore the judgment of conviction should not have been entered against him. The state's case was presented by the testimony of three witnesses. Frank A. Wolf, complaining witness, testified that on June 4, 1930, while standing in front of the Oak Land Association, 5100 Archer Avenue, in Chicago, he saw the defendant, Carl Dow, driving a car. Carl was standing on the sidewalk on the south side of the street, and being King and John Lee were with him. As he stood there, the car passed by him and stopped. The door came out of the car and started shooting. Carl saw also Carl and Carl a revolver. Carl saw the driver of the car. The witness stated he saw three revolvers. He heard a gun fire as he ran up to the second floor of the building and then heard four or five other shots. On subsequent examination he discovered three bullet holes through the door and one through a glass window. Nobody was struck by the bullet. On cross-examination Carl testified that the door fired first and he did not know who fired the other shots. He stated Carl took out of the automobile first and then Carl saw Carl and killed a man. All of the circumstances testified to took place about 9 o'clock at night, and before it was entirely dark.

Oldest Frank Wolf, another witness for the state, testified he found a couple of bullet holes at 5100 Archer Avenue that pointed to him like fresh holes. Upon information furnished him, Wolf went to the Waterloo Hotel, where defendant resided, and ready called until he came home. The officer arrived at the hotel at about 8:45 and the defendant was home at about 11:30 p.m. Upon arriving at the hotel, defendant told the officer that he had just been down town. Later that night the detective learned he said he had been

downtown getting groceries or something like that and knew nothing of the shooting.

Jen Sing, the third witness for the state, testified that he was custodian for the Oak Tong Association; that on the evening of June 4, 1930, about 9 o'clock, he was standing with the complaining witness and another man partly in front of the door that leads upstairs to that place, when he saw the defendant drive past in a car. The car then stopped, several men stepped out and some shots were fired. The witness stated he saw three revolvers, including one in possession of defendant and heard five shots fired.

Lou Gow testified in his own behalf and stated he was employed as a waiter at 3330 South State Street; that on the night of June 4, 1930, about 9 o'clock he was in his room at the Metropole Hotel; that he had not told the police officer he was downtown getting groceries, but had stated he was downtown purchasing some tea medicine; he denied having driven an automobile on the night in question or having a revolver in his possession or shooting at Frank Lei or anyone else at the place designated as 2109 Archer Avenue; that he had been ill in bed three or four days prior to June 4th, but was feeling somewhat better on that day and went to South Clark Street to get some medicine; that they had to make up the medicine and he waited there until about 11 or 11:15 and then went back to the Metropole Hotel where he was arrested by Officer Brady. On cross-examination defendant stated he could drive automobiles but had never driven one in Chicago; that he had gone downtown with one Clark, a checker cab driver who lived at the Metropole Hotel; that he had made an effort to find the cab driver, who had since the occurrence left the hotel, but without avail, and did not know where to find the cab driver at the time of the trial.

downtown getting groceries or something like that and knew nothing of the shooting.

Jim King, the third witness for the state, testified that he was custodian for the Oak Leaf Association; that on the evening of June 4, 1930, about 9 o'clock, he was standing with the complaining witness and another man partly in front of the door that leads upstairs to that place, when he saw the defendant drive past in a car. The car then stopped, several men stepped out and some shots were fired. The witness stated he saw three revolvers, including one in possession of defendant and heard five shots fired.

Len now testified in his own behalf and stated he was employed as a waiter at 2330 South State Street; that on the night of June 4, 1930, about 9 o'clock he was in his room at the Metropole Hotel; that he had not told the police officer he was downtown getting groceries, but had stated he was downtown purchasing some tea medicine; he denied having driven an automobile on the night in question or having a revolver in his possession or shooting at Frank Lee or anyone else at the place designated as 2102 Archer Avenue; that he had been ill in bed three or four days prior to June 4th, but was feeling somewhat better on that day and went to South State Street to get some medicine; that that had to make up the medicine and he waited there until about 11 or 11:15 and then went back to the Metropole Hotel where he was greeted by Officer Brady. On cross-examination defendant stated he could drive automobiles but had never driven one in Chicago; that he had gone downtown with one Clark, a checker and driver who lived at the Metropole Hotel; that he had gone in without to find the car driver, who had since the occurrence left the hotel, but without avail, and did not know where to find the car driver at the time of the trial.

Ida Robinson, the colored maid who had charge of cleaning defendant's apartment at the hotel, stated that she saw Lou Gow at the hotel on the night of June 4th at about the time that the shooting is alleged to have occurred. On cross-examination witness seemed to be confused as to the date, stating "I do not recall the day he was arrested, I really don't know the day."

The case was tried before the court without a jury and the trial judge who heard the evidence had an opportunity to observe the various witnesses and determine the facts of the case. The conflict between the state's witnesses and that of the defendant is, of course, irreconcilable. Defendant attempted to establish an alibi and it was for the court to determine whether the state established defendant's guilt beyond a reasonable doubt. We are not disposed to disturb the finding and judgment of the court upon the question of fact presented.

It is lastly urged that the court made some remarks which tended to minimize the evidence of the witness. The remarks showed impatience on the part of the court. Inasmuch as the case was heard without a jury, however, we do not regard the court's remarks as reversible error.

The judgment of the Municipal Court will be affirmed.

AFFIRMED.

HEBEL, P.J. AND WILSON, J. CONCUR.

The defendant, the colored man who had charge of the shooting gallery, a servant of the hotel, stated that she saw him at the hotel on the night of June 4th at about the time that the shooting is alleged to have occurred. He cross-examined witness seemed to be confused as to the date, stating "I do not recall the day he was arrested. I really don't know the day."

The case was tried before the court without a jury and the trial judge who heard the witness had an opportunity to observe the various witnesses and determine the facts of the case. The conflict between the state's witnesses and that of the defendant is, of course, irreconcilable. Defendant attempted to establish an alibi and it was for the court to determine whether the state established defendant's guilt beyond a reasonable doubt. It was not discussed to disturb the finding and judgment of the court upon the question of fact presented.

It is hardly urged that the court made some mistake which tended to minimize the evidence of the witness. The record showed evidence on the part of the court. Inasmuch as the case was heard without a jury, however, we do not regard the court's decision as reversible error.

The judgment of the municipal court will be affirmed.

35323

JAMES A. MALCOM,

(Plaintiff) Appellant,

v.

L. A. GRAFNO,

(Defendant) Appellee.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

265 I.A. 608³

Opinion filed March 16, 1932

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Plaintiff brought an action in the Superior Court of Cook County for personal injuries sustained by him and for damages to his automobile, arising out of a collision between his automobile and that of defendant at the intersection of Sacramento and Jackson Boulevards in Chicago. The case was tried before the court and a jury resulting in a verdict of not guilty in favor of the defendant and judgment accordingly.

The declaration consisted of four counts, the first of which charged general negligence on the part of defendant. The second count alleged that defendant violated the provisions of the Motor Vehicle Law with reference to speed. The third count charged the failure of defendant to comply with Section 102 of the ordinances of the West Chicago Park Commissioners. The fourth count alleged that defendant willfully and wantonly ran his motor vehicle into, upon and against the automobile which the plaintiff was driving.

At the conclusion of all the evidence offered on behalf of plaintiff and defendant, the court allowed defendant's motion and instructed the jury to disregard the fourth count of the declaration, which charged the defendant with willful and wanton negligence.

It appears from plaintiff's testimony that on April 15, 1930, at about 9:30 p.m. he was driving his Kupaobile Sedan in a northerly direction on Sacramento Boulevard on the right hand side of the street at about 20 miles per hour; that the signal light was

1938

JAMES L. WILSON,

(Plaintiff)

v.

J. A. ORANGE,

(Defendant)

CHICAGO COUNTY

CHICAGO COUNTY

265 L.A. 308

Opinion filed March 16, 1938

MR. JUSTICE BREND delivered the opinion of the court.

Plaintiff brought an action in the Superior Court of Cook County for personal injuries sustained by him as for damages to his automobile, arising out of a collision between his automobile and that of defendant at the intersection of Sacramento and Jackson Boulevards in Chicago. The case was tried before the court and a jury resulting in a verdict of not guilty in favor of the defendant and judgment accordingly.

The declaration consisted of four counts, the first of which charged general negligence on the part of defendant. The second count alleged that defendant violated the provisions of the Motor Vehicle Law with reference to speed. The third count charged the failure of defendant to comply with Section 102 of the ordinances of the City of Chicago with Commissioners. The fourth count alleged that defendant willfully and wantonly ran his motor vehicle into upon and against the automobile which the plaintiff was driving.

At the conclusion of all the evidence offered on behalf of plaintiff and defendant, the court allowed defendant's motion and instructed the jury to disregard the fourth count of the declaration, which charged the defendant with willful and wanton negligence.

It appears from plaintiff's testimony that on April 18, 1930, at about 3:30 a.m. he was driving his automobile west on a westerly direction on Sacramento Boulevard on the right hand side of the street at about 20 miles per hour; that the signal light was

green and had remained green about 30 to 35 feet before he approached Jackson Boulevard; that there were two cars going east on Jackson Boulevard, and two other cars standing at the light going west, and also one car on Sacramento Boulevard approaching toward the south. According to plaintiff it was the car in the center of the street going east that was involved in the accident. Another car also going east and closer to the curb, stopped at the signal light. Plaintiff stated that the car toward the curb was about 50 feet off the intersection when he first saw it, and the one in the center of the street, defendant's automobile, was about 75 feet from the intersection, and that both cars appeared to be slowing down. At that time, plaintiff's car was about 30 feet south of the sidewalk on Sacramento Boulevard. Having the green signal light, plaintiff proceeded across Jackson Boulevard, when according to his testimony, his left front wheel came in contact with the right front wheel of defendant's car, and he was dragged about 6 feet east before coming to a stop. Plaintiff testified that defendant's car proceeded about 150 feet off the intersection after the collision. It further appears from plaintiff's testimony that there is a three flat building on the southeast corner of the intersection, a three story building on the northeast corner, a hotel built up close to the sidewalk on the southwest corner and a two story residence on the northwest corner. Plaintiff further stated that when he first saw defendant's car, the latter was "about three times off the crossing," that plaintiff had the green light and proceeded to cross the intersection and did not see defendant's car again until immediately prior to the collision, when plaintiff swerved to avoid the accident and was struck by defendant's car.

Milton M. Walker, called as a witness on behalf of plaintiff, testified that he was driving south on Sacramento Boulevard, and as he approached Jackson Boulevard, he had the green light; that he was driving on the west side of the street, and as he proceeded

green and had remained green about 30 to 35 feet before he approached Jackson Boulevard; that there were two cars going east on Jackson Boulevard, and two other cars standing at the light going west, and also one car on Sacramento Boulevard approaching toward the south. According to Plaintiff it was the car in the center of the street going east that was involved in the accident. Another car also going east and closer to the curb, stopped at the signal light. Plaintiff stated that the car toward the curb was about 50 feet off the intersection when he first saw it, and the car in the center of the street, defendant's automobile, was about 75 feet from the intersection, and that both cars appeared to be slowing down. At that time, Plaintiff's car was about 30 feet south of the sidewalk on Sacramento Boulevard. Having the green signal light, Plaintiff proceeded across Jackson Boulevard, then according to his testimony, his left front wheel came in contact with the right front wheel of defendant's car, and he was dragged about 5 feet east before coming to a stop. Plaintiff testified that defendant's car proceeded about 150 feet off the intersection after the collision. It further appeared from Plaintiff's testimony that there is a three story building on the southeast corner of the intersection, a three story building on the northeast corner, a hotel built up close to the sidewalk on the south-west corner and a two story residence on the northwest corner. Plaintiff further stated that when he first saw defendant's car, the latter was "about three times off the crossing," that Plaintiff had the green light and proceeded to cross the intersection and did not see defendant's car again until immediately prior to the collision, when Plaintiff swerved to avoid the accident and was struck by defendant's car. William E. Palmer, called as a witness on behalf of Plaintiff, testified that he was driving south on Sacramento Boulevard and as he approached Jackson Boulevard, he had the green light; that

out to the intersection, defendant's car "shot in front of him", and immediately thereafter he heard a crash of the two cars; that defendant's car passed in front of his, Walker's, at a rate of about 25 or 30 miles an hour; that Walker then proceeded to cross the intersection, stopped his car and went back to see what had happened, and found the Hudson car driven by defendant about 3 or 4 houses approximately 50 to 100 feet, beyond the intersection.

Defendant testifying as a witness in his own behalf, stated that he was driving east on Jackson Boulevard with his daughter and her child at about 20 or 25 miles an hour; that as he approached Sacramento Boulevard about 75 or 80 feet from the intersection, he observed the green light; that he was following another automobile which was 6 or 8 feet ahead of him; that he did not look at the signal lights again, but when he reached the center of Sacramento Boulevard, he observed plaintiff's car coming north and kept going straight ahead to avoid the accident; that plaintiff's car struck his in the rear fender; that he had no opinion as to how fast plaintiff's car was going, except that he thought it was going faster than his own. Defendant further testified that he observed the green light at Sacramento Boulevard when he was about a block west thereof; that he was driving along about 3 or 4 feet from the curb, but as he approached Sacramento Boulevard he pulled over toward the north and followed the car in front of him, which kept right on going, until the collision occurred.

There were no other occurrence witnesses, but Edward Kubat, a West Park police officer, who testified on behalf of defendant stated that when he heard the crash, he was about one half block from the intersection, and when he arrived at the corner of Jackson and Sacramento Boulevards he saw the two machines off the center of the intersection, a little toward the southeast corner of the two streets; that he arrived at the scene of the accident about a minute

out to the intersection, defendant's car "shot in front of him", and immediately thereafter he heard a crash of the two cars; that defendant's car passed in front of his, "later", at a rate of about 25 or 30 miles an hour; that after then proceeded to cross the intersection, stopped his car and went back to see what had happened, and found the Hudson car driven by defendant about 5 or 6 houses approximately 80 to 100 feet, beyond the intersection. Defendant testifying as a witness in his own behalf.

stated that he was driving east on Jackson Boulevard with his daughter and her child at about 20 or 25 miles an hour; that as he approached Sacramento Boulevard about 75 or 80 feet from the intersection, he observed the green light; that he was following another automobile which was 5 or 6 feet ahead of him; that he did not look at the signal lights again, but when he reached the center of Sacramento Boulevard, he observed Plaintiff's car coming north and kept going straight ahead to avoid the accident; that Plaintiff's car struck him in the rear fender; that he had no opinion as to how fast Plaintiff's car was going, except that he thought it was going faster than his own. Defendant further testified that he observed the green light at Sacramento Boulevard when he was about a block west thereof; that he was driving along about 5 or 6 feet from the curb, but as he approached Sacramento Boulevard he pulled over toward the north and followed the car in front of him, which kept right on going, until the collision occurred.

There were no other occurrence witnesses, but Edward

Hubert, a city police officer, who testified on behalf of

defendant stated that when he heard the crash, he was about one-half block from the intersection, and when he arrived at the corner of Jackson and Sacramento Boulevards he saw the two machines off the center of the intersection, a little toward the southeast corner of the two streets; that he arrived at the scene of the accident about a minute

after it occurred; that he made and filed a report of the accident at the time, but had not read it over prior to the trial, which occurred about a year after the accident happened.

As grounds for reversal, it is first urged that the question of willful and wanton negligence was one of fact for the jury to determine, and that the court erred in withdrawing this count from the jury's consideration. As a basis for this contention, it is argued that defendant's failure to watch the signal lights as he approached the intersection in a closely built up neighborhood, was some evidence of willful and wanton misconduct on his part; that having observed the green light while still 75 or 80 feet from the intersection did not justify defendant in assuming that the light would continue green, but that he should have approached the crossing carefully so that he could stop his automobile if the light changed to yellow or red, and that his failure to exercise the required degree of care amounted to such a disregard of the consequences and indifference to the rights and safety of others as to constitute willful and wanton misconduct.

Under the decisions of our courts, there is a difference between negligence, whether ordinary or gross, and conduct which is willful, wanton and in reckless disregard of the rights of others. This difference is in kind and not merely one of degree. Consequently, where facts show that the injury for damage of which plaintiff complains is the result of the negligent act or conduct of the defendant, then the fact that such negligence may be said to be of such a degree as to be considered gross negligence, cannot support a charge of willful or intentional injury by the party accused.

Grinestaff v. New York Central R. R. Co., 253 Ill. App. 589. Plaintiff cites numerous cases in which the question of willful and wanton misconduct is discussed, but we are of the opinion that the circumstances of this case as testified to by the occurrence witnesses, does

after it occurred; that he made and filed a report of the accident at the time, but had not read it over prior to the trial, which occurred about a year after the accident happened.

In response for reversal, it is first urged that the

question of willful and wanton negligence was one of fact for the jury to determine, and that the court erred in withdrawing this question from the jury's consideration. As a matter of fact, no question is argued that defendant's failure to stop the signal light as he approached the intersection in a closely built up neighborhood, was some evidence of willful and wanton misconduct on his part; that having observed the green light while still 75 or 80 feet from the intersection did not justify defendant in assuming that the light would continue green, but that he should have approached the intersection carefully so that he could stop his automobile if the light changed to yellow or red, and that his failure to exercise the required degree of care amounted to such a disregard of the consequences and indifference to the rights and safety of others as to constitute willful and wanton misconduct.

Under the decision of our courts, there is a difference between negligence, whether ordinary or gross, and conduct which is willful, wanton and in reckless disregard of the rights of others. This difference is in kind and not merely one of degree. Consequently, where it is shown that the injury for which recovery is sought is the result of the negligent act or conduct of the defendant, then the fact that such negligence may be said to be of such a degree as to be considered gross negligence, cannot support a charge of willful or intentional injury by the party accused.

Wright v. New York Central & N. H. R. Co., 254 N.Y. 111, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

not constitute willfulness and wantonness on the part of defendant, according to the decisions in this state, and that, therefore, the fourth count was properly withdrawn from the jury's consideration.

The controlling question in this case is whether the verdict of the jury was against the manifest weight of the evidence. The only disinterested witness who testified to the events leading up to the collision was Milton M. Walker, and it appears from his testimony that plaintiff had the green signal as he approached the intersection, and was entitled to the right of way. Walker testified that he himself had proceeded to the intersection when defendant's car, traveling at a considerable rate of speed "shot in front of him". Defendant, according to his own testimony, did not look at the signal lights after he passed a point 75 or 80 feet west of Sacramento Boulevard. At that time he had the right of way, but he was not justified in assuming that the light would continue green, especially in view of the fact, as he himself testified, that he observed the green light one block west of Sacramento Boulevard, and should, therefore, have anticipated that it might change at any moment. Defendant does not assert that the light continued green after he reached the intersection; he did not look at the signal as he crossed, and, therefore, did not know whether it continued green or changed to amber or red. Under the circumstances, it was his duty to approach the crossing carefully and not depend on the car 6 or 8 feet ahead of him which proceeded through the intersection, without himself exercising the care that is ordinarily required of a person driving in a built up neighborhood in the city.

For the reasons stated, we believe the verdict was against the manifest weight of the evidence. Accordingly, the judgment of the Superior Court will be reversed and the cause remanded.

REVERSED AND REMANDED.

HEBEL, P.J. AND WILSON, J. CONCUR.

not constitute willfulness and wantonness on the part of defendant, according to the decision in this state, and last, therefore, the fourth count was properly withdrawn from the jury consideration.

The controlling question in this case is whether the verdict of the jury was against the weight of the evidence. The only disinterested witness who testified to the events leading up to the collision was Wilson M. Walker, and it appears from his testimony that plaintiff had the green signal as he approached the intersection, and was entitled to the right of way. Walker testified that he himself had proceeded to the intersection when defendant's car, traveling at a considerable rate of speed, came in front of him. Defendant, according to his own testimony, did not look at the signal lights after he passed a point 75 or 80 feet west of intersection. It is true that he had the light of way, and he was not justified in assuming that the light would continue green, especially in view of the fact, as he himself testified, that he observed the green light one block west of intersection - colored red, and should, therefore, have anticipated that it might change at any moment. Defendant does not assert that the light continued green after he reached the intersection; he did not look at the signal as he crossed, and, therefore, did not know whether it continued green or changed to red or yellow. Under the circumstances, it was his duty to approach the crossing carefully and to stop on the car 6 or 8 feet ahead of him which proceeded through the intersection, without himself exceeding the rate that is ordinarily required of a person driving in a built up neighborhood in the city.

For the reasons stated, we believe the verdict was against the weight of the evidence. Accordingly, the judgment of the Superior Court will be reversed and the cause remanded.

REVEREND AND HONORABLE.

35232

WILLIAM F. BISBON,

Plaintiff- Appellee,

v.

JOSEPH H. BEUTTAS, et al,

Defendants - Appellants.

89
APPEAL FROM

7
SUPERIOR COURT

COOK COUNTY.

265 I.A. 608^{4r}

Opinion filed March 16, 1932

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendants, Joseph H. Beuttas et al, from a judgment entered in the Superior Court of Cook County, in the sum of \$10,000, on account of personal injuries sustained by the plaintiff, William F. Bisson. Defendants were contractors, engaged in the erection of a building for the Sears Roebuck Company at Cleveland, Ohio. In line with their contract for the concrete, masonry, carpentry and finishing of the building, defendants had, two or three days before the accident in which plaintiff was injured, placed a temporary two by four or two by six beam across the stairway at the north end of the building. This cross brace extended entirely across the stairway and was about five feet four or five inches above the tread directly beneath it. Some natural light seeped in on this cross piece, but there was no artificial illumination. Plaintiff was a steamfitter employed by the Spohn Heating & Ventilating Company, and had been working on the building for three or four weeks. On the date of the accident he had been working on the roof, had been ordered into the basement to get a can of "dope", left the roof by a ladder, went down the west stairway, secured the "dope", then walked to the north stairway, went up the stairs, then crossed the first floor to the west stairway to the second floor, then back across to the north stairway and went from the second to the third floor in and on that stairway. Plaintiff started up the steps, mounted the first set of steps to the landing, looked down at the steps and turned

3223

WILLIAM M. HARRIS

— 225 —

13

JOHN H. DILLON

1891-1892 - 244 1/2

Opinion filed March 16, 1935

Mr. Justice William W. Taft was on the bench at the time. This is an appeal by the defendant, George A. Jones, et al. From a judgment entered in the District Court of Ohio County, in the sum of \$10,000, on account of personal injuries sustained by the plaintiff, William F. Jones. On January 1, 1904, the plaintiff was in the custody of a building for the same building at Cleveland, Ohio. In line with their contract for the same, machinery, a quantity and a building of the building, between two or three days before the accident in which plaintiff was injured, placed a temporary two by four on top of his back across the railway at the north end of the building. This cross piece extended entirely across the railway and was about five feet in length. Above the track directly beneath it. When a train came along on this cross piece, but there was no artificial illumination. There was a mechanical analogy by the same building a ventilation system, and had been running on the building for three or four years. On the day of the accident he had been working on the track, and had ordered that the system to be a new one, left the work of a leader, and when the work was done, secured the work, then walked to the north station, and on the stairs, and ordered the first train to the west station. In the second place, when the train to the north station and when the train to the west station in and on the stairs. Plaintiff walked on the track, around the first set of stairs to the west station, looked down at the stairs and crossed

going up to the third floor on the second set of risers with his hand on the rail. He had gone up two or three steps when his head hit the obstruction or brace across the stairway, whereupon he jerked his head back, struck his nose on the brace and then became unconscious. He was taken to a hospital where he remained about two weeks.

The declaration charged that plaintiff was employed by the Spohn Heating & Ventilating Company, and that defendants were erecting a building for the Sears Roebuck Company, and had entered into a contract with plaintiff's employer for the installation of the heating system; that at the time of the accident there was in full force and effect the Ohio General Code, Section 1465-37, which provided that where compensation is paid to an injured employee, the plaintiff's right to maintain a common law action is not subrogated to his employer; that on the date of the accident plaintiff was at work in the building and in the exercise of all due care and caution for his own safety, but that defendants negligently and carelessly allowed and permitted a certain two by four or two by six timber to be and remain in and across the stairway leading from the second to the third floor; that defendants should have known that plaintiff would be required to use said stairway and that plaintiff, exercising due care and caution, ran into and was struck by the said timber and injured.

The second count alleged substantially the same facts and set out the definition of the terms in the Ohio General Code and in which the "Definition of terms" is enumerated, and among others the following:

"The term 'frequenter' shall mean and include every person, other than an employee, who may go in or be in a place of employment under circumstances which render him other than a trespasser."

It is further alleged that provision is made in the said statute that every employer shall furnish employment which shall be safe for the employees therein, and shall furnish a place of employment for

going up to the third floor on the second set of stairs with his hand on the rail. He had come up two or three steps when his hand hit the obstruction or brace across the stairway, whereupon he jerked his head back, struck his nose on the brace and then became unconscious. He was taken to a hospital where he remained about two weeks.

The declaration charged that plaintiff was employed by the Spohn Heating & Ventilating Company, and that defendant were erecting a building for the Spohn Foodstuffs Company, and had entered into a contract with plaintiff's employer for the installation of the heating system; that at the time of the accident there was in full force and effect the Ohio General Code, Section 1486-37, which provided that where compensation is paid to an injured employee, the plaintiff's right to make in a common law action is not abridged to his employer; that on the date of the accident plaintiff was at work in the building and in the exercise of all due care and caution for his own safety, but that defendant negligently and carelessly allowed and permitted a certain two by four by six timber to be and remain in and across the stairway leading from the second to the third floor; that defendant should have known that plaintiff would be required to use said stairway and that plaintiff, exercising due care and caution, ran into and was struck by the said timber and injured.

The second count alleged substantially the same facts and set out the definition of the term in the Ohio General Code and in which the "definition of terms" is enumerated, and recited there the following:

"The term 'Workman' shall mean and include every person, other than an employer, who may be in or be in a place of employment under circumstances which render him liable to a tort."

It is further alleged that provision is made in the said statute that every employer shall furnish employment which shall be safe for the employees therein, and shall furnish a place of employment for

employees and frequenters, adopting and using safety devices and safeguards, and shall do everything reasonably necessary to protect life, health, safety and welfare of such employees and frequenters. The declaration then alleged that defendants failed to exercise due care and caution for the safety of the plaintiff, but negligently and unlawfully failed and omitted to furnish and maintain a safe place of employment for him in that they allowed and permitted said timber to be and remain across said stairway in violation of the statute. The third count was similar to the second, but also cited a Municipal Code of the City of Cleveland, which was not introduced in evidence or relied upon by plaintiff. To this declaration defendant filed a plea of the general issue and special pleas, but upon the trial elected to stand upon the general issue only.

As grounds for reversal, it is urged (1) that no duty rests upon an employer to warn an employee of a danger which is open and obvious; (2) that the plaintiff was guilty of contributory negligence as a matter of law; (3) that the court erred in giving plaintiff's instructions Nos. 6, 7 and 8; and (4) that the verdict is excessive.

With reference to the first ground urged, the evidence is reasonably clear that the cross beam was placed above the stairway four or five days prior to the accident, that workmen about the building were allowed to use the stairway and did make use thereof in going from the second to the third floor; that some of the workmen had seen this cross beam before the accident occurred, but plaintiff had never before used this stairway and had no knowledge of the cross beam; that on the day of the accident the other stairways were obstructed and this particular stair afforded the only access between floors at that time. Defendant takes the position that plaintiff should have seen the cross beam, which was discernible to anyone who looked, and that the employer owed him no duty to warn of a danger which was open,

employees and contractors, stopping and using safety devices and safe guards, and shall do everything reasonably necessary to protect life, health, safety and welfare of such employees and contractors. The declaration then alleged that defendants failed to exercise due care and caution for the safety of the plaintiff, but negligently and unlawfully failed and omitted to furnish and maintain a safe place of employment for him in that they allowed and permitted said stair to be and remain across said stairway in violation of the statute. The third count was similar to the second, but also cited a municipal code of the City of Cleveland, which was not introduced in evidence or relied upon by plaintiff. In this declaration defendants filed a plea of the general issue and a special plea, but upon the trial elected to stand upon the general issue only.

As grounds for reversal, it is urged (1) that no duty rests upon an employer to warn an employee of a danger which is open and obvious; (2) that the plaintiff was guilty of contributory negligence as a matter of law; (3) that the court erred in giving plaintiff's instructions Nos. 6, 7 and 8; and (4) that the verdict is excessive.

With reference to the first ground urged, the evidence is reasonably clear that the cross beam was placed across the stairway four or five days prior to the accident. That workmen about the building were allowed to use the stairway and the case was thereof in coming from the second to the third floor; that some of the workmen had seen this cross beam before the accident occurred, but plaintiff had never before used this stairway and had no knowledge of the cross beam; that on the day of the accident the other stairways were obstructed and this particular stair afforded the only access between floors at that time. Defendants urge the position that plaintiff should have seen the cross beam, which was distinguishable to anyone who looked, and that the employer owed him no duty to warn of a danger which was open,

obvious and apparent. We cannot agree with this contention, however. The danger of the cross beam was open and obvious, as the evidence shows, only to a person who was either warned of it in advance or one who was looking for it. The evidence shows that plaintiff is about five feet six inches tall and was at the time of the accident wearing a peaked cap. The steps were not yet finished. Lips to hold the concrete projected an inch or two above a portion of the tread, making it necessary for plaintiff to place his feet partly sidewise to fit the steps. He was ascending the stairway in this manner with one hand on the rail, carrying a can of "dope" in his left hand, and necessarily looking down at the steps and straight ahead. Manifestly, it would have been impossible for him to have noticed the cross beam, unless he was searching for it. Under the circumstances, the danger was not open and obvious to plaintiff. Cases cited by plaintiff's brief seem to support this conclusion.

In Wainwright v. The Railway Company, 11 Ohio Circuit Decisions 530, the plaintiff, a railroad brakeman, was injured while riding on top of some cars. He was struck against a tunnel, the clearance of which was insufficient to permit his passage. The accident took place in broad daylight. The charge of the trial court embraced the legal proposition relied on by defendants. A verdict in favor of defendant was reversed mainly on the ground that a charge to the jury is objectionable which states that if the dangers may be readily observed or are open, apparent or obvious to a man of ordinary observation, or if they can be readily seen and appreciated, then the company was under no obligation to warn its employees, without qualification as to time or circumstances or opportunity for observation, in view of the duties to be performed. The court specifically stated that the danger was obvious if the plaintiff had been looking, and by analogy the sameway be said to be true of the instant case.

obvious and apparent. It cannot agree with this contention, however. The danger of the cross beam was open and obvious, as the evidence shows, only to a person who was either warned of it in advance or one who was looking for it. The evidence shows that plaintiff is about five feet six inches tall and was at the time of the accident wearing a cap. The steps were not yet finished. It is to be noted that concrete projected an inch or two above a portion of the track, making it necessary for plaintiff to place his feet partly sideways to fit the steps. He was ascending the railway in this manner with one hand on the rail, carrying a can of "koke" in his left hand, and necessarily looking down at the steps and straight ahead. Manifestly, it would have been impossible for him to have noticed the cross beam, unless he was searching for it. Under the circumstances, the danger was not open and obvious to plaintiff. Cases cited by plaintiff's brief seem to support this conclusion.

In *Reinhardt v. The Railway Company*, 11 Mo. Circuit

Decisions 530, the plaintiff, a railroad fireman, was injured while riding on top of some cars. It was struck against a tunnel, the clearance of which was insufficient to permit his passage. The plaintiff took place in front daylight. The judge of the trial court expressed the legal proposition relied on by defendant. A verdict in favor of defendant was reversed with the ground that a charge to the jury is objectionable which states that if the danger was readily observed or was open, apparent or obvious to a man of ordinary observation, or if they can be readily seen and appreciated, then the company was under no obligation to warn the employee, without qualification as to time or circumstances or opportunity for observation, in view of the duties to be performed. The court specifically stated that the danger was obvious if the plaintiff had been looking, and by analogy the same may be said to be true of the instant case.

In Quirk v. Siegel Cooper Co., 56 N.Y.B. 49, plaintiff was passing down the corridor of a department store and fell on a skid placed on steps in the aisle. She was familiar with the steps and saw them as she approached, but did not know of the presence of the skid which was built to fit into the steps. Her attention was attracted by goods displayed on either side of the aisle, and as she reached the end, she stepped to go down and fell. It was there held that plaintiff was not guilty of contributory negligence as a matter of law.

In Illinois Central Railroad v. Welch, 52 Ill. 183, the brakeman on cars was struck by an awning which formed an obstruction negligently placed too near the track. The awning was visible to anyone who looked. A verdict was rendered for plaintiff and reversed on grounds with which we are not here concerned. On the specific question of negligence, however, the court said that the danger of the awning was of such a character as well might escape the observation of a person who had been in the employ of the defendant for a long period of time, and that there was no reason for supposing that plaintiff had acquired knowledge of the unsafe condition of the awning before his injury, as he had been but two months upon the road, and except upon two trips, had always passed the particular station in the night.

The cases cited by defendants in support of their position seem to us to be inapplicable. There are but three. In Chicago City Ry. Co. v. Sangiacomo, 130 Ill. App. 589, plaintiff's foot was injured on a conveyor between the rails on premises where he was employed. In the course of its opinion, the court observed that plaintiff was of full age, had worked in the tunnel before and knew the construction of the conveyor and that he must be held to have known that it was dangerous to put his foot between the upper and lower rails. This, of course, is not analagous to the situation

In *Wright v. Illinois Central R.R. Co.*, 22 Ill. 2d 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

was passing down the corridor of a department store and fell on a
skid placed on steps in the aisle. She was traveling with the crowd
and saw them as she approached, but did not know of the presence of
the skid which was built up into the crowd. Her attention was
attracted by goods displayed on either side of the aisle, and as she
reached the end, she stepped to go down and fell. It was there held
that defendant was not guilty of contributory negligence as a
matter of law.

In *Illinois Central Railroad v. Egan*, 22 Ill. 2d 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

broken on cars was struck by an awning which formed an obstruction
he instantly placed his foot on the track. The awning was visible to
anyone who looked. A verdict was rendered for plaintiff and reversed
on grounds which we are not here concerned. On the question
question of negligence, however, the court said that the danger of the
awning was of such a character as well might cause the plaintiff to
a person who had been in the employ of the defendant for a long period
of time, and that there was no reason for supposing that plaintiff had
acquired knowledge of the unsafe condition of the awning before his
injury, as he had been but two months upon the road, and through many
two trips, had always used the defendant's cars in the night.
The cases cited by defendant in support of their posi-

tion seem to us to be inapplicable. There are but three. In
Chicago City v. Ogden, 100 Ill. 2d 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664,

in the instant case where plaintiff had never before made use of the instrumentality in question, namely the stairway.

In Shipley v. C. & A.T.R., 164 Ill. App. 89, plaintiff was injured, as stated in the court's opinion, by his own negligence in not ascertaining the condition of the turntable which caused the injury before entering the same, in disobedience of his instructions. Obviously, this constituted contributory negligence which formed the basis of the court's decision.

In L.E. & W. R. R. CO., v. Wilson, 189 Ill. 89, it was held that to authorize a recovery against a railroad company for failure to provide an employee with a safe place to work, it must be shown that the defendant had notice of the defect complained of, and that the employee did not know thereof and had not an equal means of knowledge with the master, and the court in its opinion, said:

"If the evidence shows that the employee has had full opportunities for such observation, it is sufficient to charge him with knowledge."

In the instant case, it appears clearly that plaintiff had no knowledge of the cross beam, and of course it cannot be said by analogy to the Wilson case that he had full opportunities for such observation, unless this court should go to the extent of requiring him to make a tour of inspection throughout the building to apprise himself of dangers of this kind.

In the cases cited by defendants, the relationship of employer and employee existed in each instance. Plaintiff herein, however, was not an employee of the defendant, so that the usual rules governing a master and servant relationship do not apply. Plaintiff was a "frequenter" within the definition of the Ohio Code and defendants' liability arises out of the statutory provisions rather than out of the law of master and servant.

in the instant case where plaintiff had never before made use of the instrumentality in question, namely the railway.

In Thibault v. C. & A. M. R., 124 Ill. App. 53, plaintiff

was injured, as stated in the court's opinion, by his own negligence in not ascertaining the condition of the turntable which caused the injury before entering the same, in disobedience of his instructions. Obviously, this constituted contributory negligence which formed the basis of the court's decision.

In B. & O. v. Wilson, 123 Ill. 59, it was

held that to authorize a recovery against a railroad company for failure to provide an employee with a safe place to work, it must be shown that the defendant had notice of the defect complained of, and that the employee did not know thereof and had not an equal degree of knowledge with the master, and the court in its opinion, said:

"If the evidence shows that the employee has had full opportunity for such observation, it is sufficient to charge him with knowledge."

In the instant case, it appears clearly that plaintiff had no knowledge of the stone beam, and of course it cannot be said by analogy to the Wilson case that he had full opportunity for such observation, unless the court should go to the extent of requiring him to make a tour of inspection throughout the building to examine himself of dangers of this kind.

In the case cited by defendant, the relationship of

employer and employee existed in each instance. Plaintiff herein,

however, was not an employee of the defendant, so that the usual

rules governing a master and servant relationship do not apply.

Plaintiff was a "freeman" within the definition of the Ohio Code

and defendant, liability arises out of the statutory provisions

rather than out of the law of master and servant.

Defendants argue that in order to hold them liable for this accident, the Ohio Code must be construed to mean that employer becomes an absolute insurer of the safety and well being of every person employed or frequenter who is on the job during construction of the building. We find it unnecessary, however, to go to this extent to sustain the judgment. We believe that the rule under the Ohio Code is well stated in the case of Mainwright v. The Railway Company, supra, to be as follows:

"A peril that might be visible and apparent to a person in a favorable position and under favorable circumstances might not be obvious to another person, in the same sense or degree, whose position is less favorable to observation and appreciation of danger. Therefore, whether a servant was guilty of negligence in failing to note and avoid a peril of which he had no previous knowledge, or whether he would be entitled to notice thereof, must depend upon whether in the exercise of ordinary care under all circumstances he should have discovered it in time to avoid it."

As already stated, the circumstances in this case indicate that plaintiff was obliged to walk this stairway partly sidewise with one hand on the rail, carrying a can of paint in the other, and wearing a peaked cap. In this situation, we believe that he was in the exercise of ordinary care in looking down and straight ahead. Under the circumstances it is easily conceivable that while in the exercise of ordinary care he failed to discover the cross beam in time to avoid it. All of the facts in the case were before the jury, and we are not disposed to disturb the verdict upon the ground that plaintiff was guilty of contributory negligence as a matter of law, or that the danger was so open, obvious and apparent that plaintiff should have avoided it.

Complaint is made by plaintiff's given instructions Nos. 6, 7 and 8, because the jury was charged in general terms under the Ohio Code without stating the conditions and limitations upon the rights therein. Examination of defendants' given charges seem to have

...the fact that it is not in order to hold them liable for this reason, the Ohio Code must be construed so as to make every person engaged or responsible in the fact of every of the building. It is not necessary, however, to go to this extent to sustain the judgment. We believe that the rule under the Ohio Code is well stated in the case of State v. to be as follows:

"A party who might be visible and subject to a person in a favorable position and under favorable circumstances might not be visible to another person, in the same sense or degree, when walking is less likely to observe and observation of danger. Therefore, the exercise of ordinary care in failing to look and avoid a party of which he had no previous knowledge, or which he would be entitled to notice later, must be such as to avoid in the exercise of ordinary care under all circumstances he should have discovered it in time to avoid it."

As already stated, the circumstances in this case indicate that plaintiff was obliged to rely on the testimony of the witness who was on the rail, carrying a gun of which he was not aware. Under the circumstances it is hardly conceivable that while in the exercise of ordinary care he failed to discover the above facts in time to avoid it. All of the facts in the case were before the jury, and we are not disposed to disturb the verdict upon the ground that plaintiff was guilty of contributory negligence as a matter of law, or that the danger was so great, obvious and apparent that plaintiff should have avoided it.

Complaint is made by plaintiff's given instructions Nos. 6, 7 and 8, because the jury was charged in general terms under the Ohio Code without stating the conditions and limitations upon the rights therein. Examination of defendants' given charges seem to have

apprised the jury of the required limitations so as to have removed any possible misunderstanding on their part.

The only other assignment of error is as to the size of the verdict. The evidence shows that plaintiff was removed to a hospital after the injury, where he remained about two weeks; that thereafter he was unable to work at his trade for approximately three months; that when he tried to resume his trade he suffered from weakness when bending down to cut pipe and frequently became dizzy while walking across beams. A physician testifying on behalf of plaintiff stated that in his opinion there was a fracture at the base of plaintiff's skull; that this was shown by a Rhomberg test, which means that when a person is instructed to stand up with his feet together and eyes closed, he has a tendency to sway or fall; that plaintiff's injuries were permanent in their nature and that he is not likely to entirely regain his former health. At the time of the injury plaintiff was 36 years of age. In addition to considerable pain and suffering which he endured, his earning capacity has been impaired, according to the evidence, and the spells of dizziness and weakness are a serious handicap. Under the circumstances, we do not regard the verdict as reduced to \$10,000 excessive.

For the reasons stated, the judgment of the Superior Court will be affirmed.

AFFIRMED.

HEBEL, F.J. AND WILSON, J. CONCUR.

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any possible misunderstanding on their part.

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from weakness when bending down to cut pipe and frequently became
dizzy while walking across doors. A physician testifying on behalf
of plaintiff stated that in his opinion there was a fracture of the
base of plaintiff's skull; that this was shown by a Roentgen test,
which means that when a picture is instructed to stand up with his
feet together and eyes closed, he has a tendency to sway or fall;
that plaintiff's injuries were permanent in their nature and that
he is not likely to entirely regain his former health. At the time
of the injury plaintiff was 38 years of age. In addition to con-
siderable pain and suffering which he endured, his earning capacity
has been impaired, according to the evidence, and the expense of
distance and treatment are serious burdens. Under the circumstances,
we do not regard the verdict as reduced to 10,000 excessive.
For the reasons stated, the judgment of the superior
court will be affirmed.

APPROVED.

WILLIAM J. ANDERSON, J. CLERK.

35386

GEORGIA RICHMAN,

(Plaintiff) Appellee,

v.

CHICAGO RAPID TRANSIT COMPANY,
a Corporation,

(Defendant) Appellant.

90
APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

265 I.A. 609¹

Opinion filed March 16, 1932

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Plaintiff brought an action on the case against defendant for injury alleged to have been sustained by her as a result of a fall from the platform of defendant's railway station at Argyle Avenue in Chicago, while waiting for the approach of a train on the morning of December 19, 1928. The cause was tried before the court and a jury resulting in a verdict and judgment in favor of plaintiff for \$15,000.

The declaration consisted of three counts, the first of which was withdrawn. The second count charged that it was the duty of defendant to keep, maintain and operate its station and platform in a reasonably safe condition; that while plaintiff was on said platform preparing to board a train and in the exercise of ordinary care for her own safety, the defendant, disregarding its duty, carelessly, negligently and improperly suffered and permitted the said platform to be overcrowded, and also permitted a large number of persons to suddenly rush, surge, crowd and move toward the defendant's said train with great force and violence while she was preparing to board said train, and as a direct and proximate result thereof, plaintiff was pushed and crowded from said platform and caused to fall to and upon the track on which the train was operated. The third count is similar to the second and charged further that defendant carelessly, negligently and improperly failed to provide a suitable or sufficient number of men to properly control and direct the movements of such

(Plaintiff) appellee,

v.

CHICAGO AND NORTHWESTERN RAILWAY COMPANY,
a corporation,

(Defendant) appellant.

2651 A. 609

Opinion filed March 16, 1938

MR. JUSTICE BREWER delivered the opinion of the court.

Plaintiff brought an action on the case against defendant for injury alleged to have been sustained by her as a result of a fall from the platform of defendant's railway station at Taylor Avenue in Chicago, while waiting for the approach of a train on the morning of December 13, 1934. The case was tried before the court and a jury resulting in a verdict and judgment in favor of plaintiff for \$5,000.

The declaration consisted of three counts, the first

of which was withdrawn. The second count charged that it was the duty of defendant to keep, maintain and operate its station and platform in a reasonably safe condition; that while plaintiff was on said platform preparing to board a train and in the exercise of ordinary care for her own safety, the defendant, disregarding its duty, carelessly, negligently and improperly suffered and permitted the said platform to be overcrowded, and also permitted a large number of persons to suddenly rush, surge, crowd and shove toward the defendant's said train with great force and violence while she was preparing to board said train, and as a direct and proximate result thereof, plaintiff was pushed and crowded from said platform and caused to fall to and upon the track on which the train was operated. The third count is similar to the second and charges further that defendant carelessly, negligently and improperly failed to provide a suitable or sufficient number of men to properly control and direct the movements of such

a large number of persons as were permitted to be and remain on said platform, and failed to protect plaintiff from the dangers incident thereto.

It appears from the evidence that the accident occurred on the morning of December 19, 1929, during a heavy snowstorm which had been in progress for about two days. The defendant operated an elevated railroad and maintained a station on its Evanston branch known as "Argyle" Station. Tickets were sold downstairs and passengers were then admitted to an enclosure with stairs leading up to a loading platform with tracks on each side thereof. The tracks to the west of the platform carried the south bound and those on the east the north bound traffic. The platform was 340 feet long, 12 feet wide and 4 feet above the level of the ground on which the rails were laid. There were no railings around the edges of the platform.

On the morning of the accident there was approximately one foot of snow on the ground, and the weather was below freezing, with a 16 miles per hour gale blowing at the time. There was a general traffic tieup in the City of Chicago on said date. Busses were not running, steam roads were tied up on account of congestion at the interlocking plants, and the surface lines, while making an attempt to run, were extremely irregular and not progressing very far. By reason of these conditions, traffic on the elevated lines was heavier than usual.

It appears that plaintiff was waiting for a south bound train. At 7 o'clock that morning three trains came from the north, none of which stopped. About the same time a train approached from the south going north. A large crowd of people had gathered upon the platform waiting for trains in either direction. As a north bound train approached the Argyle Station, persons pushed and surged in every direction, seeking to gain entrance to the various cars as the train slowed down at the platform. It was during this rush that

A large number of persons as were permitted to be and remain on said platform, and failed to protect himself from the danger incident thereto.

It appears from the evidence that the accident occurred on the morning of December 19, 1930, during a heavy snowstorm which had been in progress for about two days. The defendant operated an

elevator and maintained a station on the Vanastan branch known as "Argyle" station. Tickets were sold downstairs and upstairs were then admitted to an enclosure with stairs leading up to a

leading platform with tracks on each side thereof. The tracks to the west of the platform crossed the south bound and those on the east the north bound traffic. The platform was 140 feet long, 12 feet

wide and 4 feet above the level of the ground on which the rails were laid. There were no railings around the edges of the platform. On the morning of the accident there was approximately

one foot of snow on the ground, and the weather was below freezing, with a 15 mile per hour wind blowing at the time. There was a general traffic tieup in the City of Chicago on said date. Buses

were not running, street cars were tied up on account of congestion at the interlocking plants, and the surface lines, while making an attempt to run, were extremely irregular and not progressing very far.

By reason of these conditions, traffic on the elevated lines was heavier than usual.

It appears that defendant was waiting for a south bound train. At 7 o'clock that morning three trains came from the north, none of which stopped. About the same time a train approached from

the south going north. A large crowd of people had gathered upon the platform waiting for trains in either direction. As a north bound train approached the Argyle station, persons rushed and surged in every direction, seeking to gain entrance to the various cars as

the train slowed down at the platform. It was during this time that

plaintiff was pushed, while standing on the platform, causing her to fall on the edge thereof and from there down on the tracks. Her feet flew out from under her and she fell horizontally on her back on the edge of the platform and from there down across the tracks, causing severe injuries.

It is first urged as grounds for reversal that both counts of the declaration were fatally defective and insufficient, even after verdict, to support a judgment against defendant, in that they failed to allege facts showing a duty on the part of defendant to anticipate the sudden rush of a large number of people, and to have thus guarded against the accident. Counsels' argument is predicated largely on the additional averments in the third count that defendant failed to provide a suitable or sufficient number of men to properly control and direct the movements of the crowd that was permitted to be and remain on the platform, and disregards the allegation contained in both counts that it was defendant's duty to keep the station and platform in a reasonably safe condition and the breach of that duty by "negligently and improperly suffering and permitting the said platform to become overcrowded." In fact, that portion of the declaration last quoted was inadvertently omitted from defendant's abstract of record and counsels' argument fails to take this very important allegation into account. Defendant by its brief concedes the fundamental rule that in order to state a good cause of action, three elements are indispensable; First, a duty on the part of defendant to plaintiff; Second, a breach of that duty; and third, an injury resulting proximately from such breach. Measured by this standard, plaintiff's declaration, even though it may be defective in form, is not wholly insufficient and under the rule laid down in Smith v. Rutledge, 332 Ill. 150, and Roumbon v. City of Chicago,

plaintiff was pushed, while standing on the platform, causing her to fall on the edge thereof and from there down on the tracks. Her feet flew out from under her and she fell horizontally on her back on the edge of the platform and from there down across the tracks, causing severe injuries.

It is first urged as grounds for reversal that both accounts of the description were fatally defective and insufficient, even after verdict, to support a judgment against defendant, in that they failed to allege facts showing a duty on the part of defendant to anticipate the sudden rush of a large number of people, and to have thus guarded against the accident. Defendant's argument is based largely on the additional evidence in the third count that defendant failed to provide a suitable or sufficient number of men to properly control and direct the movements of the crowd that was permitted to be and remain on the platform, and disregard the situation contained in both counts that it was defendant's duty to keep the station and platform in a reasonably safe condition and the proof of that duty by "negligently and improperly selecting and permitting the said platform to become overcrowded." In fact, that portion of the declaration last quoted was inadvertently omitted from defendant's brief of record and counsel's argument fails to take this very important allegation into account. Defendant by its brief concedes the fundamental rule that in order to state a good cause of action, three elements are indispensable; first, a duty on the part of defendant to plaintiff; second, a breach of that duty; and third, an injury resulting proximately from such breach. Covered by this standard, plaintiff's declaration, even though it may be defective in form, is not wholly insufficient and under the rule laid down in Smith v. Baltimore, 323 Ill. 130, and Johnson v. City of Chicago,

332 Ill. 70, and followed in all recent decisions, if the declaration states a cause of action, however defectively or imperfectly and the issue joined requires proof of the facts defectively stated, the declaration will be sufficient to sustain the judgment after verdict.

Illinois Central R. R. Co. v. Treat, 75 Ill.App. 327,

is similar in many respects to the instant proceeding. There, too, plaintiff fell from the platform of a railroad station and was injured. An unusually large crowd of people were gathered on the platform to await approaching trains. The declaration contained counts having similar averments to those in the instant case, and there too defendant asked the court to instruct the jury that they disregard each count. The instructions offered, however, were overruled and judgment entered in favor of plaintiff was affirmed. The rule is well established that one good count to which evidence is applicable and which is sufficient to sustain judgment, cures any error in refusing to instruct the jury to disregard other counts which may be faulty. People v. McBride, 234 Ill. 146, Wing v. Smith, 130 Ill. App. 275. Whatever may be said as to the sufficiency of that portion of the third count to which objection is made, there still remain sufficient allegations in the second count, as heretofore pointed out, to which evidence adduced upon the hearing is applicable, to sustain the judgment.

It is urged, however, that neither count of the declaration was supported by sufficient evidence to warrant a submission of the case to the jury. Under the well established rule in this state, a verdict will not be disturbed unless it is clearly and manifestly against the weight of the evidence (Cohn v. Wolf, 202 Ill. App. 325; Foster v. Swanson, 189 Ill. App. 344) and where there is some evidence, which if true, fairly tends to prove the allegations of the counts, the case must be submitted to the jury. Illinois Central R.R. Co. v. Treat, 75 Ill. App. 327, (affirmed in 179 Ill. 576). Considerable evidence was adduced at the trial to establish the charge that the platform was

THE IL. CO. and followed in all former decisions, if the declaration
states a cause in action, however defectively or incorrectly and the
issue joined remains intact of the facts defectively stated, the
declaration will be sufficient to sustain the judgment after verdict.
Illinois Central R. Co. v. Frank, 70 Ill. App. 527,
is similar in many respects to the instant proceeding. There, too,
the instant bill took the form of a railroad action and was intended
An unusually large number of people were gathered on the platform to
see the proceeding. The declaration contained several defects
which attempts to show in the instant case, and these two defects
and asked the court to instruct the jury that they should not
consider. The instruction directed, however, were erroneous and judgments
entered in favor of plaintiff was affirmed. The rule is well estab-
lished that the court should not refuse to grant a new trial if
evidence to sustain judgment, unless any error in relation to evidence
the jury to disregard other counts which may be faulty. People v.
People, 120 Ill. App. 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

crowded and that persons awaiting trains pushed and surged in all directions as trains approached. One witness, speaking of the crowded condition of the platform, said: "They were all around me; close around me. There was just standing room. * * * It seems to me like there were thousands of people on that platform that morning; it was so crowded. After they came up out of the stairway they surged ahead as best they could, which pushed us all. The crowd shoved all the way, when we went through that crowd we went just whatever way they pushed. When the train came along they pushed worse." One of the occurrence witnesses testified with reference to the accident that, "The crowd pushed her. I saw her. She was pushed off the east side of the platform on to those tracks. I just saw her pushed off by the crowd." Defendant contends that the accident was not caused by the pushing and surging of the crowd but by the rush of an individual as a train approached from the south, and points out evidence in the record of an occurrence witness to sustain its position. This, however, was one of the disputed questions of fact upon which there was evidence pro and con, and it was within the sole province of the jury to determine the question of fact from the evidence presented by both sides. We have examined the record carefully and conclude there was sufficient evidence adduced to warrant submitting the case to the jury under the well settled rule heretofore quoted and we are not disposed to disturb the verdict as being against the clear and manifest weight of the evidence or upon the ground that the counts of the declaration were not sufficiently supported by evidence to constitute issues of fact for the jury.

It appears that upon trial the court permitted Dr. Greenspahn, over the objection of the defendant, to give his diagnosis based upon certain X-ray films claimed to have been taken January 30, 1930, but not produced at the hearing. The witness testified that he made a diligent search of his office but was unable to locate

crowded and the persons waiting there rushed and surged in all directions as trains approached. The witness, speaking of the crowded condition of the platform, said: "They were all around me; those around me. There was just standing room." "It seems to me like there were thousands of people on that platform that morning; it was so crowded. After they came up out of the subway they rushed and stood as best they could, which jammed us all. The crowd moved all the way, when we went through that crowd we were just wherever they wished. When the train came along they pushed forward." "The occurrence witnessed testified with reference to the accident that," "The crowd rushed out. I saw her. She was pushed by the exact side of the platform on to these tracks. I just saw her pushed off by the crowd." "Stand at attention that the accident was not caused by the pushing and jostling of the crowd but by the rush of an individual as a train approached from the south, and points out evidence in the record of an occurrence witness to establish the position. This, however, was one of the disputed questions of fact upon which there are evidence pro and con, and it was within the province of the jury to determine the question of fact from the evidence presented by both sides. We have examined the record carefully and conclude there was sufficient evidence adduced to warrant submitting the case to the jury under the well settled rule heretofore quoted and we are not disposed to disturb the verdict as being against the clear and manifest right of the evidence as upon the ground that the counts of the indictment were not sufficiently supported by evidence to constitute issues of fact for the jury. It appears that when trial the court permitted Dr. Greenwald, over the objection of the defendant, to give his diagnosis based upon certain X-ray films claimed to have been taken January 20, 1930, but not produced at the hearing. The witness testified that he made a diligent search of his office but was unable to locate

the films; that he had a regular place for the safe-keeping of such films but they were not in the files; that he searched all parts of his office and caused a further search to be made by his assistant, without avail; that he did not dispose of the films or give them to anyone or send them out of his office and that there was no record in his office showing any disposition thereof. Upon this showing, the court permitted Dr. Greenspahn to make a diagnosis of the lost films, which included an opinion that the films disclosed a skull fracture. From other films taken later which were introduced in evidence, several expert witnesses testified that in their opinion no fracture appeared. Defendant contends that the foundation laid for Dr. Greenspahn's testimony as to the lost films was insufficient. An examination of the record, however, discloses that the only objection to the doctor's testimony was that "the films have not been produced and that they are the best evidence." The sufficiency of plaintiff's evidence to lay a foundation for the introduction of secondary evidence was not questioned and therefore defendant is precluded from objecting upon that ground on appeal. It seems to be defendant's contention that some other or different rule exists with reference to X-ray photographs or films than that ordinarily applied to lost documents, because films, as counsel contends, are at best merely secondary evidence, and that a witness should not be permitted to give evidence of the contents of secondary evidence, especially where it is necessary to explain to the jury what the film itself means, by witnesses who are skilled in reading the same. The cases cited by defendant in support of this contention, however, do not sustain its position. In Kruger v. McQuaghey, 149 Ill. App. 440, the court in discussing this particular question, merely stated that while sufficient foundation was laid to permit the X-ray skiagraph of appellee's arm to be introduced in evidence, such skiagraph is

the films; that he had a regular place for the safe-keeping of such films but they were not in the film; that he searched all parts of his office and caused a further search to be made by his assistants without avail; that he did not dispose of the films or give them to anyone or send them out of his office and that there was no record in his office showing any disposition thereof. Upon this showing the court permitted Dr. Greenbaum to make a diagnosis of the lost films, which included an opinion that the films disclosed a small fracture. Two other films taken later which were introduced in evidence, several expert witnesses testified that in their opinion no fracture appeared. Defendant contends that he found them laid for Dr. Greenbaum's testimony as to the lost films was insufficient. An examination of the record, however, discloses that the only objection to the doctor's testimony was that "the films have not been produced and that they are the best evidence." The sufficiency of Plaintiff's evidence to lay a foundation for the introduction of secondary evidence was not questioned and therefore defendant is precluded from objecting upon that ground as stated. It seems to be defendant's contention that some other or different rule exists with reference to X-ray photographs or films than that ordinarily applied to lost documents, because films, as counsel contends, are at best merely secondary evidence, and that a witness should not be permitted to give evidence of the contents of secondary evidence, especially where it is necessary to explain to the jury what the film itself means, by witnesses who are skilled in reading the same. The cases cited by defendant in support of this contention, however, do not sustain its position. In Exner v. McGowan, 149 Ill. App. 400, the court in discussing this particular question merely stated that while sufficient foundation was laid to permit the X-ray photograph of pelvis's arm to be introduced in evidence, such photograph is

by no means conclusive as to the conditions actually existing in the arm; that the skiagraph is not a picture of the object or substance itself, but of the shadow merely which is cast by such object or substance, and the evidence discloses that a picture thus produced is frequently inaccurate and misleading owing to the divergence and distortion. While this is undoubtedly true, it throws no light upon the question of whether expert testimony may be adduced to analyze a skiagraph, taken by the witness himself. In the other case cited, Hammond v. Bloomington Canning Co., 190 Ill. App. 511, it appears that an X-ray picture was taken of the injured person and doctors were permitted over the objection of appellant to testify what the X-ray showed without producing the photograph. The court held that the photograph was the best evidence as to what it showed. In that case, however, no evidence was introduced, so far as the opinion of the court shows, to lay a foundation for the introduction of secondary evidence. No other cases are cited and we have been unable to find any which enunciate the suggested rule.

It is lastly urged that the verdict is excessive. Considerable evidence was introduced upon the hearing with reference to the nature and extent of defendant's injuries. There was a conflict in the evidence as to whether or not plaintiff had sustained a concussion of the brain. There is no dispute, however, of the salient facts that plaintiff was in good health prior to the accident; that as a result of the injuries sustained by her she suffered extreme pains and became incapacitated for a long period of time. She was under the care of physicians for many months, subject to dizziness, rigidity in the base of her skull, pains about the hips, shoulder blades, arms and back, nausea and weakness. The first time she was

by no means conclusive as to the conditions actually existing in the area; but the photograph is not a picture of the object or subject itself, but of the shadow merely which is cast by such object or substance, and the evidence discloses that a picture thus produced is frequently inaccurate and misleading owing to the divergence and distortion. While this is undoubtedly true, it throws no light upon the question of whether expert testimony may be admitted to analyze a photograph taken by the witness himself. In the other case cited, Nelson v. The Western Express Co., 132 Ill. App. 511, it was held that an X-ray picture was taken of the injured person and doctors were permitted over the objection of counsel to testify what the X-ray showed without producing the photograph. The court held that the photograph was the best evidence as to what it showed. In that case, however, no evidence was introduced, so far as the opinion of the court shows, to lay a foundation for the introduction of secondary evidence. In other cases are cited and we have been unable to find any which annul to the suggested rule.

It is lastly urged that the verdict is excessive. Considerable evidence was introduced upon the hearing with reference to the nature and extent of defendant's injuries. There was a conflict in the evidence as to whether or not plaintiff had sustained a concussion of the brain. There is no dispute, however, of the fact that the plaintiff was in good health prior to the accident; that as a result of the injuries sustained by her she suffered extreme pain and became incapacitated for a long period of time. She was under the care of physicians for many months, subject to divisions, rigidity in the base of her skull, pains about the hips, shoulders, elbows, arms and back, hands and feet. The first time she was

out of bed for an entire day was in June or July, about six months after the accident. Physicians testified that she was subject to extreme nervousness, general lassitude and confused mentality and suffered from lack of sleep and loss of appetite. Up to the time of the trial plaintiff was unable to return to work and there is evidence in the record that her health has been permanently impaired. It is always difficult at best to estimate the damage resulting from injuries, and it is within the province of the jury to determine from all the evidence what fair compensation should be paid to the person injured. It frequently happens that injuries of this character may be more serious than fractures or other tangible disabilities. Those are matters, however, for the jury's consideration, and we are not disposed to disturb the verdict in this case as being excessive.

We find no reversible error. The judgment of the Superior Court will therefore be affirmed.

AFFIRMED.

HEBEE, P.J. AND WILSON, J. CONCUR.

out of bed for an entire day was in June or July, about six months after the accident. Physicians testified that she was subject to extreme nervousness, general lassitude and profound mental and physical debility from loss of sleep and loss of appetite. Up to the time of the trial plaintiff was unable to return to work and there is evidence in the record that her health has been seriously impaired. It is always difficult at best to estimate the damage resulting from injuries, and it is within the province of the jury to determine from all the evidence what fair compensation should be paid for the injuries. It frequently happens that injuries of this character may be more serious than fractures or other tangible disabilities. These are matters, however, for the jury's consideration, and we are not disposed to disturb the verdict in this case as being excessive. We find no reversible error. The judgment of the Superior Court will therefore be affirmed.

W. J. M. C.

REBE, P. J. AND JUDGE, J. J. J.

35469

SMITH BROS., INC., a Corporation,
Appellee,

v.

THOMPSON ICE CREAM COMPANY, a
Corporation, and KAHN BROS. HAY
& GRAIN CO., a corporation,

Appellants.

91
APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

265 I.A. 609²

Opinion filed March 16, 1932

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Plaintiff instituted an action in tort in the Municipal Court of Chicago against Thompson Ice Cream Company and Kahn Bros. Hay & Grain Company, defendants. The cause was heard by the court without a jury and resulted in a finding and judgment for \$424.00 against Thompson Ice Cream Company, the other defendant having been dismissed out of the case during the trial.

The facts so far as they are material to the issues involved, disclose that on December 30, 1929, defendant Thompson Ice Cream Company's truck was parked on the west side of Clark Street near Waveland Avenue facing north and proceeded across the south bound street car track in a northeasterly direction to the north bound tracks. A truck owned and operated by Kahn Bros. Hay & Grain Company was at said time proceeding in a southerly direction on Clark Street, followed at a distance of approximately 50 feet and somewhat to the left thereof by plaintiff's truck. Without warning the Kahn Bros. truck came to a sudden stop in order to allow defendant to pass in front of it across the street and plaintiff's truck, which according to the evidence, was then being driven at a speed of approximately 20 miles per hour, crashed into the rear end of the Kahn Bros. truck, causing damages, which by stipulation of the parties, reasonably amounted to \$424.00.

UNITED STATES OF AMERICA, a Corporation,

Plaintiff,

v.

THOMPSON SUBMACHINE GUN COMPANY, a Corporation, and KAHN BROS., MAY A GUN CO., a Corporation,

Defendants.

Opinion filed March 16, 1933

THE COURT HEREIN DELIVERED THE OPINION OF THE COURT. Plaintiff instituted an action in tort in the United States District Court for the Southern District of New York against Thompson Submachine Gun Company and Kahn Bros. May & Gun Company, defendants. The cause was heard by the court without a jury and resulted in a finding and judgment for \$284.00 against Thompson Submachine Gun Company, the other defendant having been dismissed out of the case during the trial.

The facts so far as they are material to the issues involved, disclose that on December 30, 1932, defendant Thompson Submachine Gun Company's truck was parked on the west side of Clark Street near Cleveland Avenue facing north and proceeded across the south bound street car track in a northerly direction to the north bound tracks. A truck owned and operated by Kahn Bros. May & Gun Company was at this time proceeding in a southerly direction on Clark Street, followed at a distance of approximately 50 feet and somewhat to the left thereof by Plaintiff's truck. Without warning the Kahn Bros. truck came to a sudden stop in order to allow defendant to pass in front of it across the street and Plaintiff's truck, which according to the evidence, was then being driven at a speed of approximately 30 miles per hour, crashed into the rear end of the Kahn Bros. truck, causing damages, which by stipulation of the parties, reasonably amounted to \$284.00.

As grounds for reversal it is first urged that the trial court determined the issues against defendant chiefly on the ground that defendant was responsible for the accident because it had violated a city ordinance by parking its truck on the wrong side of the street, and that the violation of a city ordinance, though admitted, was not the proximate cause of the collision. Considerable evidence was adduced upon the hearing by various witnesses with reference to the manner in which the collision occurred and from a close examination of the record we are led to the conclusion that the question of liability was determined by the court not upon the violation of an ordinance alone, but upon the general question of negligence, which was one of fact to be determined from all the circumstances in the case.

The salient facts in evidence disclose that plaintiff was in the exercise of due care, proceeding at a moderate rate of speed, and that the driver of plaintiff's truck tried to avoid the collision but was unable to do so because the truck proceeding him came to a sudden stop. So far as the Kahn Bros. truck is concerned, it was necessary for the driver to stop his truck suddenly in order to allow the Thompson Ice Cream Company truck to pass in front of it and thus avoid a collision between those two vehicles. The collision occurred at 9:30 in the morning on a clear, dry day. The defendant's driver, started his truck where it was parked on the wrong side of the street, pulling out in first speed, and as he proceeded across the track, he saw the Kahn Bros. truck, which had the right of way, stop suddenly about ten feet north, whereupon he continued across the track. The collision ensued a moment later. Manifestly, it was the duty of the defendant's driver to look before and going out onto the southbound track to exercise reasonable care and take every precaution necessary to avoid interference with the

an amount for recovery it is first urged that the trial court determined the issues against defendant chiefly on the ground that defendant was responsible for the accident because it had violated a city ordinance by parking its truck on the wrong side of the street, and that the violation of a city ordinance, though admitted, was not the proximate cause of the accident. Defendant's evidence was admitted upon the basis of various witnesses who testified to the manner in which the collision occurred and that a close examination of the theory as set out in the proposition that the question of liability was determined by the court and upon the violation of an ordinance alone, but upon the general question of negligence, which was not to be determined from all the circumstances in the case.

The silent facts in evidence disclosed that plaintiff was in the exercise of due care, proceeding at a moderate rate of speed, and that the driver of defendant's truck failed to avoid the collision but was unable to do so because the truck, approaching him from a westerly stop, so far as the facts were concerned, it was necessary for the driver to stop his truck suddenly in order to allow the truck to pass because it was in front of him and thus avoid a collision between these two vehicles. The collision occurred at 8:30 in the morning on a clear, dry day. The defendant's driver, at that time, stated that it was parked on the wrong side of the street, waiting out in front of the street, and as he proceeded across the street, he saw the defendant's truck, which had the light of day, and suddenly about two feet north, whereupon he continued across the street. The collision ensued a moment later. Plaintiff, it was the duty of the defendant's driver to look before he moved out into the street, and to exercise reasonable care and take every precaution necessary to avoid interference with the

two oncoming trucks from the north. There is no charge that these trucks were driving at an excessive rate of speed, and if there was any doubt about the ability of defendant's truck to cross the street without interfering with the two south bound trucks, it was the driver's duty to give them the right of way. However, these facts were all before the court who had an opportunity to hear and observe the witnesses and determine the question of negligence, and we are not disposed to disturb the judgment under the disputed evidence of the case.

Defendant also contends that plaintiff was guilty of contributory negligence, because as is stated in its brief, plaintiff's driver was not a licensed chauffeur and was driving the truck in violation of Section 29 of the Illinois Motor Vehicle Law. In this contention defendant seems strangely inconsistent because it insists with reference to the parking ordinance that the violation thereof is only prima facie evidence of negligence, and that the violation thereof by defendant was not the proximate cause of the collision; whereas with reference to the statute requiring chauffeurs employed by corporations to be specially licensed, it takes the position that this constitutes negligence that should preclude plaintiff from recovering on its claim. We concur in the rule as laid down by the defendant, that the violation of an ordinance or statute is only prima facie evidence of negligence. In the instant case, it may be conceded that the drivers of both trucks had violated an ordinance or statute and in this situation the question of liability was to be determined by an inquiry as to which party proximately caused the collision. The court evidently followed this rule and made its finding upon the whole evidence.

Negligence has generally been considered by the courts as a relative term and where under one set of circumstances a party

two crossing trucks from the north. There is no charge that these trucks were driving at an excessive rate of speed, and if there was any doubt about the ability of defendant's truck to cross the street without interfering with the two south bound trucks, it was the driver's duty to give them the right of way. However, these facts were all before the court who had an opportunity to hear and observe the witnesses and determine the question of negligence, and we are not disposed to disturb the judgment under the limited evidence of the case.

Defendant also contends that plaintiff was guilty of contributory negligence, because as is stated in the brief, plaintiff's driver was not a licensed chauffeur and was driving the truck in violation of Section 7 of the Illinois Motor Vehicle Law. In this contention defendant seems to imply negligence because it insists with reference to the existing ordinance that the violation thereof is only prima facie evidence of negligence, and that the violation thereof by defendant was not the proximate cause of the collision; whereas with reference to the statute requiring operators of motor vehicles to be especially licensed, it takes the position that this constitutes negligence that should preclude plaintiff from recovering on its claim. It is contended in the brief that the violation of an ordinance or statute is only prima facie evidence of negligence. In the instant case, it may be conceded that the driver of each truck had violated an ordinance or statute and in this situation the question of liability was to be determined by an inquiry as to which party negligently caused the collision. The court evidently followed this rule and made its finding upon the whole evidence.

Negligence has generally been considered by the courts as a relative term and where under one set of circumstances a party

may be guilty of negligence, he may under other conditions be absolved therefrom. It seems evident to us that a reasonably prudent person operating a large truck, who had parked on the wrong side of the street of a busy thoroughfare with street cars and other traffic proceeding in both directions, should be fully alert and use a degree of care to avoid injury that is commensurate with the circumstances appearing in this case, and we are not prepared to disturb a finding and judgment which holds it to be negligent conduct on the part of a driver who pulls out in front of oncoming traffic under the circumstances shown by this record.

The judgment of the Municipal Court will be affirmed.

AFFIRMED.

HEBEL, P.J. AND WILSON, J. CONCUR.

any act of negligence, he may under other conditions be
absolved therefrom. It seems evident to us that a reasonably per-
sonable person operating a large truck who had turned on the wrong side
of the street of a busy thoroughfare with street cars and other
traffic proceeding in both directions, should be fully alert and
use a degree of care to avoid injury that is commensurate with the
circumstances appearing in this case, and we are not prepared to
disturb a finding and judgment which holds it to be negligent con-
duct on the part of a driver who pulls out in front of oncoming
traffic under the circumstances shown by this record.
The judgment of the Municipal Court will be affirmed.

APPROVED.

WILLIAM F. J. AND JAMES J. CONWAY.

35825

CHICAGO TITLE AND TRUST COMPANY,
a Corporation, as Trustee,

Complainant-Appellee,

v.

BERNICE ROTENBERG, et al,

Defendants

On Appeal of ISADORE LASKIN, Sued Under
the name and description of "Unknown
Owners," Defendant,

Appellant.

92 7
APPEAL FROM

INTERLOCUTORY ORDER

OF CIRCUIT COURT

OF COOK COUNTY.

265 I.A. 609³

Opinion filed March 16, 1932

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

This is an interlocutory appeal from an order appointing a receiver in a foreclosure proceeding, prosecuted by the holder of a junior mortgage encumbrance, who, being made a party defendant as an "unknown owner", came into the proceeding after the order of appointment was entered, but within the time fixed by statute for perfecting an interlocutory appeal.

The allegations of the verified bill of complaint afford scant ground for the appointment. Frank v. Siegel, 263 Ill. App. 316. After application for a receiver had been made, however, the motion was continued various times until November 20, 1931, the date of the appointment. On the preceding day solicitors for complainant served notice upon parties of record stating that they would present to the court in support of their motion for the appointment of a receiver, a verified petition, copy of which was served together with said notice. The record shows that the notice and petition were filed with the clerk of the Circuit Court on November 20, 1931, and it is conceded that the allegations of the petition supply the deficiencies of the verified bill of complaint, and are sufficient to support the order. However, appellant takes

CHAS. H. HARRIS, JR.,
a corporation, as trustee,

Complainant-appellee,

v.

WILLIAM HARRIS, JR., et al.,

Defendants.

On appeal of a decree of the Circuit Court of the United States for the District of Columbia, entered in the case of the above parties, and captioned as above.

Appellant.

Opinion filed March 16, 1933

255 I.A. 609

1. The Circuit Court of the United States for the District of Columbia, in its opinion filed March 16, 1933, held that the decree of the Circuit Court of the United States for the District of Columbia, entered in the case of the above parties, and captioned as above, was affirmed.

2. This is an extraordinary appeal from the decree of the Circuit Court of the United States for the District of Columbia, entered in the case of the above parties, and captioned as above.

3. The receiver in a foreclosure proceeding, appointed by the holder of a junior mortgage encumbrance, who, acting under a party defendant as an "unknown owner," came into the proceeding after the order of appointment was entered, but within the time fixed by statute for perfecting an extraordinary appeal.

The allegations of the verified bill of complaint

afford count ground for the appointment. Harris v. Harris, 255 Ill.

App. 216. After application for a receiver had been made, however,

the notice was omitted various times until November 30, 1931, the

date of the appointment. In the preceding day collectors for com-

plaint served notice upon parties of record stating that they

would present to the court in support of their motion for the ap-

pointment of a receiver, a verified petition, copy of which was

served together with said notice. The record shows that the notice

and petition were filed with the clerk of the Circuit Court on

November 30, 1931, and it is recommended that the allegations of the

petition among the defendants of the verified bill of complaint,

and are sufficient to support the court. However, respondent takes

the position that the supplemental petition was not before the court when the appointment was made, and in support of this contention he relies upon the language of the order which recites that the cause came on to be heard "in accordance with the prayer of the verified bill of complaint filed in said case and the agreements contained in the trust deed therein sought to be foreclosed, and the court having considered said bill and trust deed, and now being fully advised in the premises, doth find, etc."

The petition sets forth in detail a description of the property conveyed as security, the gross rental thereof, and a detailed account of the managing expenses, and it clearly appears therefrom that the real estate affords scant security for the mortgage indebtedness. Having failed to make these allegations in the bill of complaint, it seems clear that the petition was prepared to supply the deficiencies of the bill and for the purpose of bringing complaint within the rule which requires parties to present equitable considerations to support the application for a receiver. Notice and a copy of this petition were served upon the solicitors of record, the notice stating that complainants would appear before the chancellor and present in support of their motion for the appointment of a receiver "a certain petition, copy of which is attached hereto and herewith served upon you." The record shows that the copies and petition were filed on the day of the appointment and it is inconceivable that the petition, after being prepared and served upon counsel and filed with the clerk of the court, was not presented to the court for consideration. Counsel for appellant was not present when the order was entered and the only basis for his contention that the petition was not before the court rests upon the recital in the order hereinbefore quoted. We have the entire record before us, however, including the notice and petition, and it appears therefrom that ample showing was made to support the order.

the position that the assignment of the bill of exchange was not before the court when the assignment was made, and in support of this contention he relies upon the language of the order which recites that the same came on to be heard "in accordance with the order of the verified bill of complaint filed in said case and the assignment contained in the first deed therein sought to be foreclosed, and the court having considered said bill as true debt, and now being fully satisfied in the premises, doth find, etc."

The petition sets forth in detail a description of the property conveyed as security, the gross rental thereof, and a detailed account of the managing expenses, and is clearly apparent therefrom that the real estate affords about a security for the mortgage indebtedness. Having failed to make these allegations in the bill of complaint, it seems clear that the petition was prepared to supply the deficiencies of the bill and for the purpose of bringing complaint within the rule which requires parties to present available considerations to support the application for a receiver. Notice and a copy of this petition were served upon the solicitors of record, the notice stating that complainants would appear before the chancellor and present in support of their motion for the appointment of a receiver "a certain petition, copy of which is attached hereto and herewith served upon you." The record shows that the copies and petition were filed on the day of the appointment and it is inconceivable that the petition, after being prepared and served upon counsel and filed with the clerk of the court, was not presented to the court for consideration. Counsel for defendant was not present when the court was returned and the only basis for his contention that the petition was not before the court rests upon the recital in the order foreclosing the debt. We have the entire record before us, however, including the notice and petition, and it appears therefrom that ample showing was made to support the order.

The further ground urged for reversal relates to the filing and approval of complainant's bond. The order of appointment entered on November 30, 1931, gave complainant ten days within which to file its bond. No bond was filed within the time specified in the order, however, but on December 7, 1931, complainant, pursuant to notice given, procured an order obtaining leave to file its bond instant and the approval thereof by the court. As a result of this procedure the appellant contends that the filing of the complainant's bond after the expiration of the time limited by the appointing order, does not serve to render effective the order appointing the receiver.

We cannot agree with this contention however. Section 123 of the Practice Act providing for appeals from interlocutory orders specifies that such appeals must be taken within thirty days from the entry of the order. Appellants were therefore obliged to take their appeal within thirty days from November 30, 1931, when the order was entered. If they had deferred doing this until after thirty days had expired, they would have lost their right of appeal, which is purely statutory. They did, however, perfect their appeal within the required time. This appeal is from the order of appointment and the validity of that order is the only question before us. That order on its face is regular and we see no reason for disturbing it.

Appellants rely for their position on Lichstern v. J. Rosenbaum Grain Company, 176 Ill. App. 250, wherein it was held that an injunctive order which failed to fix a time within which complainant should file his bond, in effect delegated to complainant the power to decide whether the need for a preliminary injunction was urgent or otherwise. That case is not controlling, however, because the order there was invalid on its face, while this order is proper.

The equities of the case justify the appointment, and no error was committed. The order of the Circuit Court will therefore be affirmed.

AFFIRMED.

HEBEL, P.J. AND WILSON, J. CONCUR.

The further ground urged for reversal relates to the filing and approval of appellant's bond. The order of appointment entered on November 24, 1931, gave appellant ten days within which to file his bond. No bond was filed within the time specified in the order, however, but on December 7, 1931, appellant, pursuant to notice given, procured an order obtaining leave to file his bond. Appellant and the approval thereof by the court, as a result of this, occurred the appellant contends that the filing of the appellant's bond after the expiration of the time limited by the appointing order, does not serve to render effective the order appointing the receiver. He cannot agree with this contention, however. Section 123 of the Practice Act providing for appeals from interlocutory orders specified that such appeals must be taken within thirty days from the entry of the order. Appellants were therefore obliged to take their appeal within thirty days from November 24, 1931, when the order was entered. If they had delayed until ten weeks after thirty days had expired, they would have lost their right of appeal, which is purely statutory. They did, however, assert their appeal within the required time. This appeal is from the order of appointment and the validity of that order is the only question before us. That order on its face is regular and we see no reason for disturbing it. Appellants rely for their position on Anderson v. A. Thompson Grain Company, 175 Ill. App. 200, wherein it was held that an informational order which failed to fix a time within which appellant should file his bond, in effect delegated to appellant the power to decide whether or not to file his bond. In that case, however, the order there was invalid on its face, while this order is proper. The question of the case finally the appointment, and no error was committed. The order of the circuit court will therefore be affirmed.

35859

JOE GERSTEIN,

Complainant - Appellee,

v.

GEORGE MILONAS, et al.,

Defendants.

On Appeal of ANNA RIMA,

Defendant-Appellant.

INTERLOCUTORY APPEAL

FROM CIRCUIT COURT

OF COOK COUNTY.

265 I.A. 609⁴

Opinion filed March 16, 1932

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

On July 3, 1931, the Circuit Court of Cook County appointed the Lawndale National Bank receiver in a foreclosure proceeding. On January 6, 1932, appellant filed her verified petition for the removal of the receiver. The prayer of the petition was denied by the court and an appeal prayed therefrom. It purports to be an interlocutory appeal and two grounds are urged for reversal of the order, namely, (1) that the bill was insufficient to support the order, and (2) that an amendment was allowed substituting one party complainant for another.

Section 122, Chapter 110, Illinois Revised Statutes, provides that whenever an interlocutory order or decree is entered in any suit then pending, "granting an injunction, or overruling a motion to dissolve the same, or enlarging the scope of an injunction order, or appointing a receiver, or giving other or further powers or property to a receiver already appointed, an appeal may be taken from such interlocutory order or decree."

Appellee has filed no brief in this proceeding. While it appears from appellant's brief and argument that the order appointing the receiver may have been improvidently entered because of the insufficient showing made by the bill of complaint, no interlocutory appeal was taken from that order within the time fixed by the statute. By this appeal appellant seeks to review the order

JOE G. HARRIS,

Complainant - Appellee,

v.

GEORGE W. HARRIS, et al.,

Defendants.

On appeal from the Circuit Court of Cook County.

Respondent-Appellant.

OF COOK COUNTY.

265 I.A. 609

Opinion filed March 16, 1932

MR. JUSTICE PRINCE delivered the opinion of the court.

On July 3, 1931, the Circuit Court of Cook County

appointed the Lawrence National Bank receiver in a foreclosure

proceeding. On January 6, 1932, appellant filed his verified peti-

tion for the removal of the receiver. The prayer of the petition

was denied by the court and an appeal was taken therefrom. It appears

to be an interlocutory appeal and two grounds are urged for reversal

of the order, namely, (1) that the bill was insufficient to support

the order, and (2) that an amendment was allowed substituting one

party complainant for another.

Section 121, Chapter 110, Illinois Revised Statutes,

provides that whenever an interlocutory order or decree is entered

in any suit then pending, "granting an injunction, or restraining

motion to dissolve the same, or enlarging the scope of an injunction

order, or appointing a receiver, or giving order of further order

or property to a receiver already appointed, an appeal may be taken

from such interlocutory order or decree."

Appellee has filed no brief in this proceeding. While

it appears from appellee's oral argument that the order

appointing the receiver may have been impermissibly entered because

of the insufficient showing made by the bill of complaint, no in-

terlocutory appeal was taken from that order within the time fixed

by the statute. By this appeal appellee seeks to reverse the order

of the chancellor denying the petition to remove the receiver. Under the foregoing statute an interlocutory appeal does not lie from such order. The appeal will therefore be dismissed.

APPEAL DISMISSED.

HEBEL, P.J. AND WILSON, J. CONCUR.

of the channel, leaving the station to receive the receiver.
Under the following conditions an intercomparative system does not lie
from such order. The system will therefore be finished.

1950, 1951, 1952, 1953, 1954, 1955, 1956, 1957, 1958, 1959, 1960, 1961, 1962, 1963, 1964, 1965, 1966, 1967, 1968, 1969, 1970, 1971, 1972, 1973, 1974, 1975, 1976, 1977, 1978, 1979, 1980, 1981, 1982, 1983, 1984, 1985, 1986, 1987, 1988, 1989, 1990, 1991, 1992, 1993, 1994, 1995, 1996, 1997, 1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 2180, 2181, 2182, 2183, 2184, 2185, 2186, 2187, 2188, 2189, 2190, 2191, 2192, 2193, 2194, 2195, 2196, 2197, 2198, 2199, 2200, 2201, 2202, 2203, 2204, 2205, 2206, 2207, 2208, 2209, 2210, 2211, 2212, 2213, 2214, 2215, 2216, 2217, 2218, 2219, 2220, 2221, 2222, 2223, 2224, 2225, 2226, 2227, 2228, 2229, 2230, 2231, 2232, 2233, 2234, 2235, 2236, 2237, 2238, 2239, 2240, 2241, 2242, 2243, 2244, 2245, 2246, 2247, 2248, 2249, 2250, 2251, 2252, 2253, 2254, 2255, 2256, 2257, 2258, 2259, 2260, 2261, 2262, 2263, 2264, 2265, 2266, 2267, 2268, 2269, 2270, 2271, 2272, 2273, 2274, 2275, 2276, 2277, 2278, 2279, 2280, 2281, 2282, 2283, 2284, 2285, 2286, 2287, 2288, 2289, 2290, 2291, 2292, 2293, 2294, 2295, 2296, 2297, 2298, 2299, 2300, 2301, 2302, 2303, 2304, 2305, 2306, 2307, 2308, 2309, 2310, 2311, 2312, 2313, 2314, 2315, 2316, 2317, 2318, 2319, 2320, 2321, 2322, 2323, 2324, 2325, 2326, 2327, 2328, 2329, 2330, 2331, 2332, 2333, 2334, 2335, 2336, 2337, 2338, 2339, 2340, 2341, 2342, 2343, 2344, 2345, 2346, 2347, 2348, 2349, 2350, 2351, 2352, 2353, 2354, 2355, 2356, 2357, 2358, 2359, 2360, 2361, 2362, 2363, 2364, 2365, 2366, 2367, 2368, 2369, 2370, 2371, 2372, 2373, 2374, 2375, 2376, 2377, 2378, 2379, 2380, 2381, 2382, 2383, 2384, 2385, 2386, 2387, 2388, 2389, 2390, 2391, 2392, 2393, 2394, 2395, 2396, 2397, 2398, 2399, 2400, 2401, 2402, 2403, 2404, 2405, 2406, 2407, 2408, 2409, 2410, 2411, 2412, 2413, 2414, 2415, 2416, 2417, 2418, 2419, 2420, 2421, 2422, 2423, 2424, 2425, 2426, 2427, 2428, 2429, 2430, 2431, 2432, 2433, 2434, 2435, 2436, 2437, 2438, 2439, 2440, 2441, 2442, 2443, 2444, 2445, 2446, 2447, 2448, 2449, 2450, 2451, 2452, 2453, 2454, 2455, 2456, 2457, 2458, 2459, 2460, 2461, 2462, 2463, 2464, 2465, 2466, 2467, 2468, 2469, 2470, 2471, 2472, 2473, 2474, 2475, 2476, 2477, 2478, 2479, 2480, 2481, 2482, 2483, 2484, 2485, 2486, 2487, 2488, 2489, 2490, 2491, 2492, 2493, 2494, 2495, 2496, 2497, 2498, 2499, 2500, 2501, 2502, 2503, 2504, 2505, 2506, 2507, 2508, 2509, 2510, 2511, 2512, 2513, 2514, 2515, 2516, 2517, 2518, 2519, 2520, 2521, 2522, 2523, 2524, 2525, 2526, 2527, 2528, 2529, 2530, 2531, 2532, 2533, 2534, 2535, 2536, 2537, 2538, 2539, 2540, 2541, 2542, 2543, 2544, 2545, 2546, 2547, 2548, 2549, 2550, 2551, 2552, 2553, 2554, 2555, 2556, 2557, 2558, 2559, 2560, 2561, 2562, 2563, 2564, 2565, 2566, 2567, 2568, 2569, 2570, 2571, 2572, 2573, 2574, 2575, 2576, 2577, 2578, 2579, 2580, 2581, 2582, 2583, 2584, 2585, 2586, 2587, 2588, 2589, 2590, 2591, 2592, 2593, 2594, 2595, 2596, 2597, 2598, 2599, 2600, 2601, 2602, 2603, 2604, 2605, 2606, 2607, 2608, 2609, 2610, 2611, 2612, 2613, 2614, 2615, 2616, 2617, 2618, 2619, 2620, 2621, 2622, 2623, 2624, 2625, 2626, 2627, 2628, 2629, 2630, 2631, 26

35249

AARON FALSTEIN, doing business
as ACME LEATHER CO.,

(Plaintiff) Appellee,

v.

HEATH & MILLIGAN MFG. CO.,
a Corporation,

(Defendant) Appellant.

APPEAL FROM

SUPERIOR COURT,

COCK COUNTY.

265 I.A. 609⁵

Opinion filed March 16, 1932

MR. JUSTICE WILSON DELIVERED THE OPINION OF THE COURT.

Plaintiff brought his action for damages for breach of warranty growing out of the sale by the defendant to the plaintiff of certain paint or pigment used in the coloring of leather. Plaintiff's declaration consisted of three counts.

The first count charges that the defendant sold the plaintiff a certain mahogany paint, which was manufactured by the defendant and used by the plaintiff for the purpose of covering leather, which leather was afterwards retailed by the plaintiff to his trade which used it in the manufacture of traveling bags, etc., and that the plaintiff relied upon the skill of the defendant in manufacturing a mahogany paste suitable for the purpose for which it was intended; that the defendant sold and furnished to the plaintiff mahogany paste which was defective and which was used by the plaintiff in his business or trade, as a result of which the plaintiff was damaged.

The second count is based upon practically the same facts and charges an express warranty.

The third count is similar to the first count.

Defendant filed a plea of the general issue and the cause was heard before the court without a jury, resulting in a finding in favor of the plaintiff, damages were assessed at the sum of \$8,590.20, and judgment entered on the finding.

From the facts it appears that plaintiff's business

ALAN L. LEBLANC, doing business
as ALAN LEBLANC CO.,

(Plaintiff) Appellee,

v.

WETA & ALLEN, INC.,
a corporation,

(Defendant) Appellant.

Opinion filed March 16, 1938

MR. JUSTICE WILSON delivered the opinion of the court.

Plaintiff brought his action for damages for invasion of territory growing out of the sale by the defendant to the plaintiff of certain paint or pigment used in the coloring of leather. Plaintiff's declaration consisted of three counts.

The first count charged that the defendant sold the plaintiff a certain proprietary paint, which was manufactured by the defendant and used by the plaintiff for the purpose of coloring leather, which leather was afterwards resold by the plaintiff to his trade which was in the manufacture of clothing bags, etc., and that the plaintiff failed upon the skill of the defendant in manufacturing a proprietary paint and his for the purpose for which it was intended; that the defendant sold and furnished to the plaintiff proprietary paint which was defective and which was used by the plaintiff in his business or trade, as a result of which the plaintiff was damaged.

The second count is based upon the fact that the defendant sold and charged an excessive price.

The third count is similar to the first count. Defendant filed a plea of the general issue and the case was heard before the court without a jury, resulting in a finding in favor of the plaintiff, damages were assessed at the sum of \$10,000.00, and judgment entered in the finding. From this case it appears that plaintiff's business

consisted of buying leather and coloring it with a mixture made of paint combined with oil, alcohol and lacquer. After the leather was colored it was cut into different sizes and sold to manufacturers for the purpose of making it into bags, suit cases, and other leather goods.

Prior to the shipment in question, plaintiff had dealt with defendant and had purchased some of the mahogany paste which had been suitable for the purpose and had also purchased some of the material which had been unsuitable and unfit. The defendant, through its representative Conway, was familiar with the purpose for which the mahogany paste was purchased. In June of the year 1927, plaintiff explained to Conway that certain leather which had been submitted to the process of finish with the mahogany paste or paint, which had been purchased in April of that year, had turned green, and Conway stated that he would have the laboratories of the defendant company make an examination of it for the purpose of finding out the defects. Subsequent purchases of this material from the defendant, when used, caused the leather to turn green and, on October 7, 1927, the defendant company wrote the plaintiff, stating in effect that they were attempting to remedy the trouble and that its laboratories were at work endeavoring to produce a Sealer that could be successfully applied so as to permit a foundation sufficiently elastic to permit of the re-coating of leather.

In the month of December, 1927, plaintiff again purchased mahogany paste from the defendant and proceeded to use it in his business, but unsuccessfully. The leather so used was discolored and in time assumed a green shade.

The Uniform Sales Act, Chapter 121a, Par. 18, Cahill's Illinois Revised Statutes, 1931, provides:

consisted of buying leather and coloring it with a mixture of paint combined with oil, alcohol and linseed. After the leather was colored it was cut into different sizes and sold to manufacturers for the purpose of making it into bags, suit cases, and other leather goods.

Prior to the shipment in question, plaintiff had dealt with defendant and had purchased some of the mahogany paste which had been suitable for the purpose and had also purchased some of the material which had been unsuitable and white. The defendant, through its representative Conway, was familiar with the mahogany paste which the mahogany paste was purchased. In June of the year 1927, plaintiff explained to Conway that certain leather which had been submitted to the process of finishing with the mahogany paste or paint, which had been purchased in April of that year, had turned green, and Conway stated that he would have the laborer of the defendant company make an examination of it for the purpose of finding out the defects. Subsequent purchase of this material from the defendant, when used, caused the leather to turn green and, on October 7, 1927, the defendant company wrote the plaintiff, stating in effect that they were attempting to remedy the trouble and that the laborer were at work on everything to produce a leather that would be successfully applied so as to permit a finish similar to that of leather.

In the month of December, 1927, plaintiff again purchased mahogany paste from the defendant and proceeded to use it in his business, but unsuccessfully. The leather so used was discolored and in time assumed a green shade.

The Uniform Sales Act, Chapter 131A, Sec. 13.

Smith's Illinois Uniform Sales Act, 1931, provided:

"where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, and it appears that the buyer relies on the seller's skill or judgment (whether he be the grower or manufacturer or not) there is an implied warranty that the goods shall be reasonably fit for such purpose."

See also Fuchs & Lang Co. v. Kittredge & Co., 242 Ill. 88; Lathrop-Paulson Co. v. Perksen, 239 Ill. App. 400.

The evidence in the record sustains the position of plaintiff, that the attention of the defendant was called to the purpose for which the material was to be used and the reliance of the plaintiff upon the implied promise of the defendant to provide a mahogany paste suitable for the purpose for which it was intended. We believe there is ample evidence to bring the case under the rule announced under the Sales Act, as well as under the general rule announced by the courts of this state.

We see no force in the argument that there was a variance between the proof and the declaration, and if there had been, it was not called to the attention of the court and cannot be raised here for the first time. Cipperly v. Carmack, 258 Ill.App.593.

On the trial of the cause plaintiff introduced in evidence certain invoices of sales showing certain items sold by him. These invoices were made out by a bookkeeper under his direction and supervision. Plaintiff testified that the merchandise enumerated in these various invoices was defective because of the use of material of the defendant, and that the merchandise was returned and marked, "No charge" and that it became necessary to replace the material. The only objection to these items, so far as we are able to ascertain from the record, was that the foundation was not sufficiently laid for the purpose of their introduction in evidence. We believe the testimony in support of the manner in which these records were kept and made out, was sufficient to permit their introduction. No

"where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, and it appears that the buyer relies on the seller's skill or judgment (whether he be the proper or manufacturer or not) there is an implied warranty that the goods shall be reasonably fit for such purpose."

See also Smith & Lusk Co. v. Atkinson & Co., 222 Ill. 52; Laughlin

Wilson Co. v. Larkins, 222 Ill. 121; 400.

The evidence in the record sustaining the position of

plaintiff, that the attention of the defendant was called to the

purpose for which the material was to be used and the reliance of

the plaintiff upon the implied promise of the defendant to provide

a satisfactory paste suitable for the purpose for which it was intended.

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raised here for the first time. Quinn v. Larkins, 222 Ill. 121; 400.

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these various invoices was defective because of the use of material of

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only objection to these items, so far as we are able to ascertain

from the record, was that the foundation was not sufficiently laid

for the purpose of their introduction in evidence. We believe the

testimony in support of the manner in which these records were kept

and made out, was sufficient to permit their introduction. It

objection was made on the ground that they were not proper for the purpose of showing damages sustained by the plaintiff and they stand alone in the record as the only evidence in the case on that question.

It is insisted that the proper measure of damages is the reasonable market or cost price to replace the defective leather. If the question had been raised at the time of the introduction of these invoices, plaintiff would have been afforded an opportunity to meet the objection. Not having done so, the defendant should be precluded from raising the question here.

The court's finding and judgment was for \$6,590.20. A computation of the items in question shows an amount of \$4,051.52. The judgment under the evidence adduced shows an excess of \$2,538.68, There being no other evidence of damages in the record, except that contained in these invoices, plaintiff will be required to remit the sum of \$2,538.68, or the judgment will be reversed and the cause remanded.

For the reasons expressed in this opinion, the judgment will be entered here for \$4,051.52, upon remittitur within 10 days, otherwise the judgment will be reversed and the cause remanded for a new trial.

JUDGMENT AFFIRMED UPON REMITTITUR;
OTHERWISE REVERSED AND REMANDED.

HEBEL, P.J. AND FRIEND, J. CONCUR.

objection was made on the ground that they were not proper for the purpose of showing damages sustained by the plaintiff and they stood alone in the record as the only evidence in the case on that question.

It is insisted that the proper measure of damages is the reasonable market or cost price to replace the defective leather. If the question had been raised at the time of the introduction of these invoices, plaintiff would have been afforded an opportunity to meet the objection. Not having done so, the defendant should be precluded from raising the question here.

The court's finding and judgment was for \$8,339.58. A computation of the items in question shows an amount of \$4,071.58. The judgment under the evidence adduced shows an excess of \$4,267.98. There being no other evidence of damages in the record, except that contained in these invoices, plaintiff will be awarded no more than the sum of \$4,267.98, or the judgment will be reversed and the cause remanded.

For the reasons expressed in this opinion, the judgment will be entered here for \$4,071.58, upon remittitur within 10 days, otherwise the judgment will be reversed and the cause remanded for a new trial.

JUDGMENT AFFIRMED FOR REMITTITUR;
COSTS OF APPEAL AND REVERSAL.

REBEL, C.J. AND FRIEND, J. CONCUR.

35358

UNION BANK OF CHICAGO, Administrator
of the Estate of STELLA JAWORSKY,
Deceased,

Defendant in Error,

v.

WILLIAM J. NOEY,

Plaintiff in Error.

957
ERROR TO

SUPERIOR COURT.

COOK COUNTY.

265 I.A. 610

Opinion filed March 16, 1932

MR. JUSTICE WILSON DELIVERED THE OPINION OF THE COURT.

This is an action for trespass on the case for personal injuries resulting in the death of Stella Jaworsky, an infant 4 years of age, by reason of the negligence of the driver of an automobile truck owned by the defendant and operated by one of his employees.

The deceased being under the age of 7 years, the question of contributory negligence on her part does not arise. The question of due care on the part of the defendant in the operation of his truck is not raised on this appeal.

We are asked to reverse on the ground that the evidence shows contributory negligence on the part of one of the beneficiariss, which would preclude a recovery; that the court erred in the giving of a certain instruction in the words of the statute; that the declaration does not state a cause of action, and that there was a failure of proof as to the date of the death of plaintiff's intestate.

John Jaworsky, father of the deceased, testified that she was 4 years and nine months of age; that he saw her in the house 10 or 15 minutes before the accident, at which time she was playing in the kitchen. He stated that he did not know that the child had gone out and was upon the street just prior to the accident; that there was a yard in front of the house, and that the kitchen was in the rear. There was a fence and a gate, but no lock on the gate;

WILLIAM J. HOLT, Plaintiff in Error,
vs.
Defendant in Error,
JAMES H. HOLT, Administrator of the Estate of Stella J. Holt, Deceased.

Defendant in Error,

v.

WILLIAM J. HOLT,

Plaintiff in Error.

COOK COUNTY.

265 I.A. 610

Opinion filed March 16, 1938

MR. JUSTICE ... This is an action for damages on the basis of personal injuries resulting in the death of Stella J. Holt, an infant 4 years of age, by reason of the negligence of the driver of an automobile truck owned by the defendant and operated by one of his employees.

The deceased being under the age of 7 years, the question of contributory negligence on her part does not arise. The question of due care on the part of the defendant in the operation of his truck is not raised on this appeal.

We are asked to reverse on the ground that the evidence shows contributory negligence on the part of one of the beneficiaries, which would preclude a recovery; but the court erred in the giving of a certain instruction in the words of the statement; that the decedent does not state a cause of action, and that there was a failure of proof as to the date of plaintiff's interest.

John J. ... she was 4 years and nine months of age; that he saw her in the house 10 or 15 minutes before the accident, at which time she was playing in the kitchen. He stated that he did not know that the child had gone out and was upon the street just prior to the accident; that there was a yard in front of the house, and that the kitchen was in the rear. There was a fence and a gate, but no lock on the gate;

that somebody must have opened it, although he believed that the deceased herself could have done so. He had never seen her playing on the street prior to the day of the accident.

The accident happened on 17th street in the City of Chicago, County of Cook and State of Illinois, and from the evidence it appears that there were other children upon the street at the time. The rule in regard to the question of negligence of parents in permitting children to be upon the streets is announced in the case of City of Chicago v. John Major, Admr. 18 Ill. 349. The court in its opinion says;

"A large majority of children living in cities depend upon the daily labor of both parents for subsistence, and these parents are unable to employ nurses, who may keep a constant and vigilant eye momentarily upon their children; and we can not hold, as a matter of law, that every time a child, four years of age, steps into the street unattended, the mother is guilty of such negligence as would authorize every reckless or careless driver to run over and trample it down with impunity, or as would authorize the city to expose "traps and pit-falls in every corner of the streets, in which a child may be drowned or maimed. Such a rule of law ought to depopulate a city of all its laboring inhabitants. In this, as in all other cases, it must be left to the jury to determine whether the parents of the child have been guilty of negligence in suffering the child to be in the streets."

To the same effect see West Chicago St. Ry. Co. v. Liderman, 187 Ill. 187 Ill. 463; Fannon v. Morton, 228 Ill. App. 415.

The question was one for the jury and, at the request of the defendant, it was fully instructed as to the care required by parents in looking after the safety of their children. The jury was fully informed that if the negligence of the parents contributed to the injury, then there could be no recovery.

It is insisted that the court erred in instructing the jury in the language of the statute. We see no force in this argument. It has been repeatedly held that the giving of such an instruction is not error. Van Meter v. Curney, 240 Ill. App. 165; Geschwinder v. Comer, 223 Ill. App. 417; Ward v. Meredith, 220 Ill. 66.

that somebody must have opened it, although he believed that the deceased himself could have done so. He had never seen her playing on the street prior to the day of the accident.

The accident happened on 17th street in the City of Chicago, County of Cook and State of Illinois, and from the evidence it appears that there were other children upon the street at the time. The rule in regard to the question of liability of parents in permitting children to be upon the streets is announced in the case of City of Chicago v. John Major, Adm'r, 18 Ill. 340, 20 Ill. 400.

It is a large majority of children living in cities depend upon the daily labor of both parents for maintenance, and these parents are unable to employ others, who may keep a constant and vigilant eye constantly upon their children, and we can not hold, as a matter of law, that every time a child, from the state of the street, steps into the street and is injured, the mother is guilty of such negligence as would render every reckless or careless driver to run over and trample it down with impunity, or to render otherwise the city to expose "traps and pitfalls in every corner of the streets, in which a child may be drowned or maimed. Such a rule of law would be to make a city of all its footways liable to suit. In this, as in all other cases, it must be left to the jury to determine whether the parents of the child have been guilty of negligence in suffering the child to be in the streets."

To the same effect see City of Chicago v. John Major, Adm'r, 18 Ill. 340, 20 Ill. 400; Farmer v. Norton, 100 Ill. 415, 416.

The question was one for the jury and, at the request of the defendant, it was fully instructed as to the duty of parents in looking after the safety of their children. The jury was fully informed that if the negligence of the parents contributed to the injury, then there could be no recovery.

It is insisted that the court erred in instructing the jury in the language of the statute. We see no force in this argument. It has been repeatedly held that the giving of such an instruction is not error. See Farmer v. Norton, 100 Ill. 415, 416; City of Chicago v. John Major, Adm'r, 18 Ill. 340, 20 Ill. 400; City of Chicago v. John Major, Adm'r, 18 Ill. 340, 20 Ill. 400.

The declaration charges that at the time the motor truck struck the deceased she sustained bodily injuries, which on said April 17, 1930, caused her death. The objection to the declaration was that it did not allege a particular date on which the deceased came to her death and, therefore, the court could not tell from the pleadings that it occurred within one year after the accident. Even though there might be some question as to the certainty of the allegation of the declaration, nevertheless, the declaration was filed within three months after the accident, in the name of the administrator, and charged that the deceased left surviving her certain persons who had sustained injuries by reason of her death. It is apparent from the record that the suit was filed within the period of one year after the accident and was for damages resulting from the death of the deceased. This court will take notice from the record that the action comes within the statutory period.

Elliott v. Atchison, T. & S. F. Ry. Co., 263 Ill. App. 466.

It is claimed by defendant that the declaration does not allege the date of the death of the deceased. Hartray v. Chicago Railways Co., 290 Ill. 85. In that case suit was not brought until after a year had elapsed from the date of the injuries which resulted in death. In the case at bar the action was brought within one year and the declaration contained the statement already referred to, from which it could have been deduced that the death occurred on April 17, 1930. Moreover, the action for the death of the deceased having been started within the year, it is apparent that the requirements of the statute have been complied with. Elliott v. Atchison, T. & S. F. Ry. Co., 263 Ill. App. 466.

We find no reversible error in the record and the judgment of the Superior Court is affirmed.

JUDGMENT AFFIRMED.

HEBEL, P.J. AND FRIEND, J. CONCUR.

The declaration operates that at the time the action was filed it did not allege a particular date on which the deceased came to her death and, therefore, the court could not tell from the pleadings that it occurred within one year after the death. Even though there might be some question as to the necessity of the allegation of the declaration, nevertheless, the declaration was filed within three months after the accident, in the name of an administrator, and charged that the deceased later surviving certain persons who had sustained injuries by reason of her death. It is apparent from the record that the suit was filed within the period of one year after the accident and was for damages resulting from the death of the deceased. This court will take notice from the record that the action comes within the statutory period. Kilgore v. Kilgore, 7 S. E. 2d 111, 112, 113.

It is claimed by defendant that the declaration does not allege the date of the death of the deceased. Kilgore v. Kilgore, 7 S. E. 2d 111, 112, 113. In that case suit was not brought until after a year had elapsed from the date of the injuries which resulted in death. In the case at bar the action was brought within one year and the declaration contained the statement already referred to, from which it could have been deduced that the death occurred on April 17, 1930. Moreover, the action for the death of the deceased having been started within the year, it is apparent that the records of the estate have been complied with. Kilgore v. Kilgore, 7 S. E. 2d 111, 112, 113.

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35377

OSCAR B. MCGLOSSON,
(Plaintiff) Appellee,
v.
HARRY W. SEHL,
(Defendant) Appellant.

96
APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

265 I.A. 610²

Opinion filed March 16, 1932

MR. JUSTICE WILSON DELIVERED THE OPINION OF THE COURT.

This was an action brought by the plaintiff, in the small claims branch of the Municipal Court and tried without a jury, to recover for legal services rendered for and on behalf of the defendant.

June 24, 1930, the defendant was introduced to the plaintiff at plaintiff's office and there stated that he was anxious to make a loan of \$20,000. Plaintiff at the time was a practicing lawyer and undertook to secure this loan for the defendant and a written agreement was entered into between the parties stating the amount of the loan required and the interest to be paid and a number of items regarding the worth of the defendant, the value of the property, occupation of the defendant and the amount of defendant's salary. The agreement provided that in the event the loan was procured, defendant was to pay as an attorney's fee 10 per cent of the amount secured and, in the event the loan was not procured through no fault of plaintiff, then the plaintiff was to be compensated for his services in the amount of \$200. Plaintiff took steps to procure the loan and then asked for the abstracts of title, but was informed by the defendant that he did not care to go on with the loan, whereupon plaintiff wrote the defendant asking him to pay the \$200 stipulated in the agreement. To this communication the defendant replied; "if you will just have patience, hang on a little while and I will be able to do something for you."

26377

OSCAR B. MCGILLIBREW,

(Plaintiff) Appellee,

v.

MARION W. KENT,

(Defendant) Appellant.

BY BRIAN W.

26377 I.A. 310

Opinion filed March 16, 1938

U.S. JUSTICE ALFRED DENVER, JR. vs. JAMES W. KENT, JR.

This was an action brought by the plaintiff, in

the small claims branch of the District Court, and tried without a jury, to recover for legal services rendered for and on behalf of the defendant.

On June 21, 1937, the defendant was introduced to the

plaintiff at plaintiff's office and there stated that he was anxious to make a loan of \$20,000. Plaintiff at the time was a practicing

lawyer and undertook to secure this loan for the defendant and a written agreement was entered into between the parties stating the

amount of the loan required and the interest to be paid and a number of items regarding the worth of the defendant, the value of

the property, occupation of the defendant and the amount of

defendant's salary. The agreement provided that in the event the

loan was procured, defendant was to pay an attorney's fee of 10 per cent of the amount secured and, in the event the loan was not

procured through no fault of plaintiff, then the plaintiff was to

be compensated for his services in the amount of \$100. Plaintiff

took steps to procure the loan and then asked for the payment of

title, but was informed by the defendant that he did not care to go

on with the loan, whereupon plaintiff wrote the defendant asking

him to pay the \$100 stipulated in the agreement. To this communication

then the defendant replied; "it you will just have patience, hang

on a little while and I will be able to do something for you."

Defendant again wrote plaintiff asking for further indulgence on behalf of the plaintiff.

Counsel for defendant treated the application as one for a loan and insisted that the services rendered were not those of attorney to client. The written agreement, however, refers to the amount to be paid, "as and for attorney's fees."

From the evidence the services appear to have been those of attorney for client, as well as broker for a loan. The question of usury does not enter into the cause of action inasmuch as the loan was never placed and the \$200 fee was for services rendered preliminary to the making of the loan.

The court found the issues in favor of the plaintiff and against the defendant and assessed plaintiff's damages at the stipulated amount of \$200 and we see no reason for disturbing the judgment.

For the reasons stated, the judgment of the Municipal Court is affirmed.

JUDGMENT AFFIRMED.

HEBEL, P.J. AND FRIEND, J. CONCUR.

Defendant again wrote plaintiff asking for further instructions as to
half of the plaintiff.

Counsel for defendant treated the plaintiff as one
for a loan and insisted that the services rendered were not those
of attorney to client. The written agreement, however, refers to
the amount to be paid, "as and for attorney's fees."

From the evidence the services appear to have been
those of attorney for client, as well as broker for a loan. The
question of usury does not enter into the case of action inasmuch
as the loan was never placed and the \$200 fee was for services
rendered preliminary to the making of the loan.

The court found the issues in favor of the plaintiff
and against the defendant and assessed plaintiff's damages at the
stipulated amount of \$200 and we see no reason for disturbing the
judgment.

For the reasons stated, the judgment of the municipal
court is affirmed.
JUDGMENT AFFIRMED.

REXEL, J. L. AND RYLAND, J. CONCUR.

35397

RUTH LIDDY,

Plaintiff-Appellee,

v.

PUSHMAN BROS., a corporation,

Defendant-Appellant.

97
APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

265 I.A. 610³

Opinion filed March 16, 1932

MR. JUSTICE WILSON DELIVERED THE OPINION OF THE COURT.

Plaintiff Ruth Liddy brought her action against the defendant, Pushman Bros., a corporation, for damages sustained by reason of personal injuries received on the evening of February 18, 1930, as a result of being struck by a motor truck operated by one of the servants of the defendant. The jury found the defendant guilty and assessed plaintiff's damages at the sum of \$7,500 and judgment was entered on the verdict.

Plaintiff's declaration consisted of four counts.

The first count charged general negligence in the running, operation and management of the truck; the second count charged the defendant with negligence in running and operating the truck at a high rate of speed in violation of the statute of ^{the} State of Illinois; the third charged willful and wanton negligence on the part of the defendant through its servants and agents; and the fourth count charged that the defendant by its servants and agents failed to keep a proper lookout when approaching a street intersection.

Defendant pleaded the general issue and shortly before the trial and sometime after the accident, by leave of court, filed its additional and special plea charging that the servant of the defendant operating the truck was not acting within the scope of his employment at the time of the accident.

From the undisputed facts it appears that the plaintiff, in company with one Ellene Mitchell, boarded a westbound 73rd

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265 I.A. 610

Opinion filed March 16, 1938

MR. JUSTICE CLARK delivered the opinion of the court.

Plaintiff made a study through her action against the defendant, a corporation, for damages sustained by reason of personal injuries received on the evening of February 12, 1930, as a result of being struck by a motor truck operated by one of the servants of the defendant. The jury found the defendant guilty and assessed plaintiff's damages at the sum of \$7,500 and judgment was entered on the verdict.

Plaintiff's contention consisted of four counts.

The first count charged general negligence in the handling, operation and management of the truck; the second count charged the defendant with negligence in turning and operating the truck at a high rate of speed in violation of the statute of Illinois; the third charged willful and wanton negligence on the part of the defendant through its servants and agents; and the fourth count charged that the defendant by its servants and agents failed to keep a proper lookout when approaching a street intersection.

Defendant pleaded the general issue and shortly before the trial and sometime after the verdict, by leave of court, filed its additional and special plea stating that the servants of the defendant operating the truck was not acting within the scope of his employment at the time of the accident.

From the undisputed facts it appears that the driver, in company with one Elmer Mitchell, boarded a westbound 1930

street car at the corner of 73rd street and Jeffery avenue. When the car reached Stony Island avenue the plaintiff and her friend Ilene Mitchell alighted from the car and walked north to the sidewalk on 73rd street. The car had stopped at the east side of Stony Island avenue and after the plaintiff and her friend reached the north side of 73rd street the car started across Stony Island avenue in a westerly direction and the plaintiff and her friend also proceeded across at this street intersection in a westerly direction and in the same direction in which the street car was being operated. Stony Island avenue at this place is a north and southbound street, very wide and with a grass plot extending throughout the middle of said street upon which were located two street car tracks, one northbound and one southbound. The east side of Stony Island avenue was used for northbound traffic and the west side was used for southbound traffic. The distance from curb to curb of the east side of Stony Island avenue used by the northbound traffic was 50 feet. The accident happened between 7:30 and 8:00 in the evening and the pavement at the time was wet.

Ilene Mitchell testified that before starting across Stony Island avenue from the corner of 73rd street, both she and the plaintiff looked to the south and saw nothing coming and then started to walk across Stony Island avenue and that the street car was proceeding right along side of them; that just before they reached the curb and within four or five feet from it, they saw the lights on the motor truck and before they could move it was upon them. She did not hear any horn or warning and was knocked unconscious. Both girls were struck by the motor truck.

Doolittle, a witness called on behalf of plaintiff, testified that he did not see the accident but was driving west on 73rd street and turned his car north on Stony Island avenue and saw

street car at the corner of 7th street and Jeffrey Avenue. When the car reached Tony Island Avenue the witness and her friend Irene Schell lighted from the car and walked north to the sidewalk on 7th street. The car had stopped at the east side of Tony Island Avenue and after the witness and her friend reached the north side of 7th street the car started across Tony Island Avenue in a westerly direction and the witness and her friend also proceeded across at this street intersection in a westerly direction and in the same direction in which the street car was being operated. Tony Island Avenue at this place is a north and south street, very wide and with a grass plot extending through the middle of said street upon which were located two street car tracks, one north-bound and one south-bound. The east side of Tony Island Avenue was used for north-bound traffic and the west side was used for south-bound traffic. The distance from curb to curb of the east side of Tony Island Avenue used by the north-bound traffic was 60 feet. The accident happened between 7:30 and 8:00 in the evening and the pavement at the time was wet.

Irene Schell testified that before starting across Tony Island Avenue from the corner of 7th street, both she and the witness looked to the south and saw nothing coming and then started to walk across Tony Island Avenue and that the street car was proceeding right along side of them; that just before they reached the curb and within four or five feet from it, they saw the lights on the motor truck and before they could move it was upon them. The car did not bear any horn or warning and was knocked unconscious. Both girls were struck by the motor truck.

Occident, a witness called on behalf of Occident, testified that he did not see the accident but was driving west on 7th street and ran up his car north on Tony Island Avenue and saw

two girls lying on the street toward the west side of Stony Island avenue; that the plaintiff was from 75 to 150 feet north of the crossing and had been knocked about 75 feet. This witness took the girls to the hospital. Plaintiff was unconscious at the time.

The motorman in charge of the street car upon which the girls had been riding testified that Stony Island was a boulevard stop and that it was customary to stop street cars at that point before proceeding across; that he did this on the night in question; that at the time he started to cross Stony Island avenue there was no traffic close to him, but that he saw a car coming on the other side of the E. & Q. tracks, approximately 150 feet away; that it was approaching the street car in the middle of the street and the witness testified that it was coming between 45 and 50 miles an hour; that it did not slacken its speed at the time it struck the girls and did not sound any horn or give any warning. When he saw this automobile approaching he brought his car to a dead stop about two-thirds of the way across the street and the automobile swerved and kept on by and in front of the car. After the accident one of the girls was about 3 feet from the west curb and 75 or 80 feet north of the crosswalk. He testified that the weather was murky; that the intersection was well lighted, and that the street car in question was approximately 36 feet long.

Plaintiff testified that she did not remember anything after the accident and was home in bed for 2 or 3 weeks with an ice bag on her head; that her left leg had sustained a fracture; that there were sore places on her back and the whole side of her leg was bruised and scraped; that after the fourth week she was able to get up and continue in school, although not regularly; that she had headaches, sometimes two or three a day and would have to go home and stay in bed and had to give up her athletic exercises; that before the accident her weight was 123 pounds and that after the accident she weighed 93 pounds; that at the time of the trial her weight was 117 pounds.

two girls lying on the street toward the west side of Spring Street
avenue; that the girl with the head injury was lying on her back with her
arms extended and her head toward the west. This witness took the
girls to the hospital. The girl with the head injury was taken to the
hospital in charge of the street car which was a double-deck
car. The girl had been riding toward the west side of Spring Street
and that it was customary to stop at the intersection of Spring
Street and the street crossing; that he did not see the girl in question
that at the time he started to cross Spring Street toward the west
no traffic close to him, but that he saw a car coming on the other
side of the S. & G. tracks, approximately 100 feet away; that it was
approaching the street car in the middle of the street and the witness
testified that it was coming between the car and the street car; that it
did not slacken its speed at the time it struck the girl and did
not sound any horn or give any warning. When he saw this automobile
approaching he brought his car to a stand still about two-thirds of
the way across the street and the automobile struck and killed her by
and in front of the car. After the accident one of the girls was
about 3 feet from the west curb and 75 or 80 feet north of the
crosswalk. He testified that the weather was sunny; that the inter-
section was well lighted, and that the street car in question was
approximately 35 feet long.
The witness testified that he did not remember anything
after the accident and was home in bed for 2 or 3 weeks with an ice
bag on her head; that her left leg had sustained a fracture; that
there were some places on her back and the right side of her leg
bruised and swollen; that after the fourth week she was able to get
up and continue in school, although not regularly; that she had
graduated, sometimes two or three days and would have to go home and
stay in bed and had to give up her athletic exercises; that before the
accident her weight was 125 pounds and that after the accident she
weighed 95 pounds; that at the time of the trial her weight was

Dr. Rach, called on behalf of plaintiff, testified that she had suffered a concussion of the brain and that there was vomiting and that she had consulted him a number of times in regard to headaches, vertigo and fainting spells which, in his opinion, was a permanent condition.

Plaintiff's mother testified that frequently the plaintiff wakes up at night and screams and cries, and complains of pains in her head; that she faints frequently; that she never had any of these symptoms before the accident, but had enjoyed perfect health.

The truck in question was driven by one Neshan Kashian, who testified that he was working for Pushman Bros. and had been in the country about 4 years; that at the time of the accident he was going to the garage where the defendant kept its trucks; that this garage was at the corner of Dearborn and Lake streets in the loop; that his employer had told him to take the car to the garage after deliveries, but that he stopped at his home to get dinner and that it was after this meal that he was proceeding to the garage. Prior to the time he stopped for dinner he had delivered a rug at about 5:30 o'clock in the afternoon on 81st Street and that he stopped at his home for dinner because it was on his way back to the garage. He testified that his car went about 5 feet after striking the girls; that he tried to pass between the girls and the curb, and his right front fender touched the plaintiff and threw her to one side; that he had no chance to blow his horn.

A witness Hagopian testified on behalf of the defendant that he was a clerk and in charge of the drivers; that he told the driver of the truck at the time he started to drive the car for the defendant, that he should not use the car except to make deliveries and if the hour was late he was to bring the car back to the garage.

Dr. Koch, called on behalf of Plaintiff, testified

that she had suffered a concussion of the brain and that there was vomiting and that she had consulted him a number of times in regard to headaches, vertigo and fainting spells which, in his opinion, was a permanent condition.

Plaintiff's mother testified that frequently the

plaintiff wakes up at night and screams and cries, and complains of pains in her head; that she is very frequently; that she never had any of these symptoms before the accident, but had enjoyed perfect health.

The truck in question was driven by one Nathan

Kashan, who testified that he was working for Nathan Koch, and had been in the country about 4 years; that at the time of the accident he was going to the garage where the defendant kept the trucks; that this garage was at the corner of Dearborn and Lake streets in the loop; that his employer had told him to take the car to the garage after deliveries, but that he stopped at his home to get dinner and that it was after this meal that he was proceeding to the garage.

Prior to the time he stopped for dinner he had delivered a rug at about 5:30 o'clock in the afternoon on Erie street and when he stopped at his home for dinner because it was on his way back to the garage. He testified that he went about 5 feet after walking the girls; that he tried to pass between the girls and the car, and his right front fender touched the plaintiff and threw her to one side; that he had no chance to show his hand.

A witness who was called on behalf of the

defendant that he was a clerk and in charge of the driver; that he told the driver of the truck at the time he started to drive the car for the defendant, that he should not use the car except to make deliveries and if the hour was late he was to bring the car

This evidence was evidently introduced for the purpose of supporting defendant's plea, namely, that the driver should not have stopped for dinner before returning the truck to the garage and that in doing so, he was acting outside the course of his employment.

Error is predicated on the fact that counsel for plaintiff asked the witness Kashian whether he had a license to operate the truck at the time of the accident. This was upon the theory that he was not a regular driver of the defendant corporation and therefore had not received any such instructions. Subsequently the court instructed the jury that the fact that the driver was not a licensed chauffeur at the time of the accident, had no bearing whatever on the question of negligence and that the jury should disregard it. Even though there might be some question as to the admissibility of the evidence, the error, if any, was cured by the instruction of the court.

It is insisted that the court erred in refusing to give defendant's instruction number 1. This instruction told the jury that it was the duty of the plaintiff to exercise ordinary care to look out for approaching automobiles. The court properly refused this instruction because it was not properly limited to the three counts charging general negligence. If it had been so confined to these counts, it should have been given. A person may recover even though guilty of contributory negligence when injured by the willful and wanton misconduct of another.

We find no error in the giving of plaintiff's instruction number 10. This is the instruction generally given in regard to damages and there was evidence to support it. We cannot say that the plaintiff was guilty of contributory negligence as a matter of law and there is ample evidence to sustain the charge that the defendant was negligent in the manner in which the motor truck was

This evidence was evidently introduced for the purpose of supporting defendant's plea, namely, that the driver should not have stopped for slower drivers returning the truck to the garage and that in doing so, he was acting outside the course of his employment.

Error is predicated on the fact that counsel for plaintiff asked the witness KASHIAN whether he had a license to operate the truck at the time of the accident. This was upon the theory that he was not a regular driver of the defendant corporation and therefore had not received any such instruction. Subsequently the court instructed the jury that the fact that the driver was not a licensed chauffeur at the time of the accident, had no bearing whatever on the question of negligence and that the jury should disregard it. Even though there might be some question as to the admissibility of the evidence, the error, if any, was caused by the instruction of the court.

It is insisted that the court erred in refusing to give defendant's instruction number 1. This instruction told the jury that it was the duty of the plaintiff to exercise ordinary care to look out for approaching automobiles. The court properly refused this instruction because it was not properly limited to the three counts charging general negligence. If it had been so confined to these counts, it should have been given. A person may recover even though guilty of contributory negligence when injured by the willful and wanton misconduct of another.

To find no error in the giving of plaintiff's instruction number 10. This is the instruction generally given in regard to damages and there was evidence to support it. It cannot say that the plaintiff was guilty of contributory negligence as a matter of law and there is ample evidence to sustain the charge that the defendant was negligent in the manner in which the motor truck was

operated. It seems clear that the driver of this truck was trying to cut across in front of the street car in his hurry to reach the garage.

It is insisted that the driver of the truck at the time of the accident was not engaged in the business of his employer and counsel rely upon the rule announced in Cohen v. Fayette, 233 Ill. App. 458. The facts in that case, however, were very different. There the driver of the truck had returned after his work to his employer's place of business and then instead of putting the car up, had taken it back to his home in order to get his dinner and, after having had his meal, was in the act of returning to the garage. In the case at bar the driver of the truck was on his way to the garage for the purpose of returning the car to the possession of the defendant. We are unable to say that the fact that he stopped for dinner would alter the situation. It was necessary to return the car to the garage and this was part of his employment. He was engaged in this act at the time of the accident. In the Cohen v. Fayette case cited, the driver had returned the car to the garage and then taken it out upon his own business. Freehill v. Consumers Co., 243 Ill. App. 1; Swanoutt v. W. M. Trout Auto Livery Co., 176 Ill. App. 606. We find no such misconduct as charged by the defendant in the remarks of counsel as would justify a reversal of the cause.

Plaintiff had a right to cross the street at the intersection and had no reason to anticipate that defendant would try to drive in front of the street car at a high rate of speed. The fact that the witness Ilene Mitchell acted in exactly the same manner as plaintiff is some evidence bearing upon the question as to whether or not plaintiff acted in a manner in which a reasonably prudent and cautious person would act. In crossing on Stony Island avenue at the point in question she was protected by the street car proceeding in the same direction and naturally had a right to

operated. It seems clear that the driver of this truck was trying to cut across in front of the street car in his hurry to reach the garage.

It is insisted that the driver of the truck at the time of the accident was not engaged in the business of his employer and consequently upon the rule announced in Wright v. Ryer, 171 Ill. App. 488. The facts in that case, however, were very different. There the driver of the truck had returned from his work to his employer's place of business and then instead of waiting for the car to be taken to his home in order to get his dinner and after having had his meal, was in the act of returning to the garage. In the case at bar the driver of the truck was on his way to his garage for the purpose of returning the car to the possession of the defendant. We are unable to say that the fact that he stopped for dinner would alter the situation. It was necessary to return the car to the garage and this was part of his employment. He was engaged in this act at the time of the accident. In the Wright v. Ryer case cited, the driver had returned the car to the garage and the taken it out upon his own business. Wright v. Ryer, 171 Ill. App. 488. We find no such statement as set forth by the defendant in the remarks of counsel as would justify a reversal of the case. Plaintiff had a right to cross the street at the intersection and had no reason to anticipate that defendant would try to drive in front of the street car at a high rate of speed. The fact that the witness Llewellyn noted in writing the same manner as plaintiff is mere evidence bearing upon the question as to whether or not plaintiff acted in a manner in which a reasonably prudent and careful person would act. In crossing on Stony Island Avenue at the point in question she was preceded by the street car proceeding in the same direction and naturally had a right to

assume that automobiles approaching that point would be kept under control because of the very fact that the street car was crossing at that point. There is ample evidence showing negligence on the part of the driver of the truck and in our opinion substantial justice has been done. The evidence as to the injuries received is sufficient to support the verdict and we see no reason for disturbing it.

For the reasons stated in this opinion the judgment of the Superior Court is affirmed.

JUDGMENT AFFIRMED.

HEBEL, P.J. AND FRIEND, J. CONCUR.

assume that immediately approaching that point would be that under
control because of the very fact that it was almost out of the
at that point. There is ample evidence showing negligence on the
part of the driver of the truck and in the opinion of the
justice has been done. The evidence as to the vehicle involved
is sufficient to support the verdict and we see no reason for
disturbing it.

For the reasons stated in this opinion the judgment
of the superior court is affirmed.
JUDGMENT AFFIRMED.

JUSTICE, J. J. ROYCE, J. C. ROYCE.

35426

FILMORE PAINT CO., a corporation,

(Plaintiff) Appellee,

v.

PH. M. MOSHEIK,

(Defendant) Appellant.

98
APPEAL FROM

MUNICIPAL COURT

265 I.A. 610⁴
OF CHICAGO.

Opinion filed March 16, 1932

MR. JUSTICE WILSON DELIVERED THE OPINION OF THE COURT.

Plaintiff confessed judgment in the Municipal Court on two promissory notes aggregating \$362, executed by the defendant and payable to the order of one Dave Levitt. Subsequently, defendant filed his verified petition in said cause asking to have the judgment vacated; the judgment was opened up and leave was given the defendant to appear and defend. Upon a hearing by the court a finding was entered against the defendant for \$430 and judgment entered on the finding, from which judgment this appeal is taken.

The president of the plaintiff company testified that the notes were given to the company by Levitt and that they were the property of the plaintiff. Levitt testified that he transferred the notes to the plaintiff before maturity in part payment of a claim for \$700 which he owed the plaintiff company for material purchased. The defendant testified that he executed the notes and delivered them to Levitt and that sometime prior thereto he had talked to a clerk in the employ of the plaintiff company, who told him that Levitt would do the job in a proper manner. Defendant further attempted to show that the job was not done in a proper manner and that Levitt had agreed to wait for his money. It also appeared from the record that Levitt signed the affidavit of claim as agent for the plaintiff company. Because of this fact counsel for defendant insists he had

265 I.A. 610
 7-10-38
 18

12448
 WILLIAMS PAINT CO., a corporation,
 (Plaintiff) vs.
 J. E. WOODHILL,
 (Defendant) Appellant.

Opinion filed March 16, 1938

THE COURT: The plaintiff, WILLIAMS PAINT CO., a corporation, brought this action against the defendant, J. E. WOODHILL, for breach of contract. The plaintiff alleges that the defendant, who was its agent for the sale of its paint, delivered to it a quantity of paint which it had ordered and that the defendant failed to deliver to it the balance of the paint which it had ordered. The defendant denies these allegations and claims that the paint which it delivered to the plaintiff was not the paint which it had ordered and that the plaintiff failed to pay for the paint which it had delivered to it. The plaintiff claims that the defendant failed to deliver to it the balance of the paint which it had ordered and that the defendant failed to pay for the paint which it had delivered to it. The defendant claims that the paint which it delivered to the plaintiff was not the paint which it had ordered and that the plaintiff failed to pay for the paint which it had delivered to it. The court finds that the plaintiff has proved its case and that the defendant is liable for the balance of the paint which it had ordered. The court awards judgment for the plaintiff and awards costs to it.

the right to show that Levitt was, in fact, the agent of the company. The agency was denied by the president of the company and, moreover, there is no evidence showing that the company held the notes otherwise than as holders for value. Elgin Nat. Bank v. Goecke, 295 Ill. 403.

There is nothing in the petition asking to have the judgment vacated charging that Levitt was the agent of the defendant company, and there are no facts alleged in the petition other than conclusions of the pleader which would have justified the setting aside of the judgment by confession. The court heard the evidence and we see no reason for disturbing its finding nor the judgment entered thereon.

For the reasons stated, the judgment of the Municipal Court is affirmed.

JUDGMENT AFFIRMED.

HEBEL, P.J. AND FRIEND, J. CONCUR.

the right to show that Levitt was, in fact, the agent of the company. The agency was denied by the president of the company and, moreover, there is no evidence showing that the company held the notes other-
 wise than as holders for value. Elgin Nat. Bank v. Egan, 111. 402.

There is nothing in the petition tending to show the judgment vacated charging that Levitt was the agent of the defendant company, and there are no facts alleged in the petition other than conclusions of the pleader which would have justified the setting aside of the judgment by confession. The court need not be advised and we see no reason for disturbing its finding and the judgment entered thereon.

For the reasons stated, the judgment of the municipal Court is affirmed.

THOMAS J. MURPHY.

RECEIVED, 7.3.1904, J. C. MURPHY.

TULLY LaTESSA and P.YRIGOYEN,
co-partners, doing business
under the name and style of
LaTESSA WOOD CARVING COMPANY,

(Plaintiffs) Appellees,

v.

THE MERIT COMPANY,
a corporation,

(Defendant) Appellant.

99
APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

265 I.A. 611¹

Opinion filed March 16, 1932

MR. JUSTICE WILSON DELIVERED THE OPINION OF THE COURT.

Plaintiffs' statement of claim charges that on or about April 8, 1929, defendant employed plaintiffs to carve and furnish an ornamental pattern or design for a casket, for which defendant agreed to pay the sum of \$3,495; that thereafter on or about June 8, 1929, plaintiffs completed and delivered said pattern or design in accordance with the agreement; that at various times thereafter defendant paid plaintiffs various sums of money on account, but has failed to pay the balance.

Defendant's affidavit of merits admits that the plaintiffs submitted a design for a pattern for a casket on or about April 8, 1929, and agreed for the sum of \$3,495 to make a pattern in accordance with the design submitted and to secure a casting for a casket to weigh between 1100 and 1300 pounds and to be delivered on or about June 28, 1929; denies plaintiffs delivered a complete pattern and charges that the plaintiffs did not secure or deliver a cast for a casket made from said pattern; admits that defendant paid in advance on account of said work, the sum of \$1,495, and admits owing the plaintiffs the sum of \$550 for a pattern which was to be delivered January 23, 1931; denied that the defendant is indebted and claims that the sum of \$1,495 should be paid back to the defendant.

The cause was tried by the court without a jury, resulting in a finding in favor of the plaintiffs and assessing

72-9-2002

under the name and style of
co-partners, doing business
with Robert and William

18-119 (1911/12)

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THE NEW YORK PUBLIC LIBRARY
ASTOR LENOX TILDEN FOUNDATION
500 5TH AVENUE
NEW YORK 17, N.Y.

(continued) 1970-1981

WROTH: 11.10.1946

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113 A.1 223

Opinion filed March 16, 1932

The court was tried by the court without a jury, resulting in a finding in favor of the plaintiffs and awarding

damages at the sum of \$2,550 and judgment on the finding.

Defendant insists that the judgment is not supported by the evidence and that the court decided the cause upon matters in evidence immaterial to the issues. As to this latter contention, the answer is obvious that the cause having been tried by the court without a jury, it is presumed that matters only material to the issue have been considered.

From the evidence it appears that Tully LaTessa and P. Yrigoyan were engaged in the business of wood engraving under the style and name of LaTessa Wood Engraving Company. The plaintiff company had been doing business with the defendant for three or four years.

LaTessa testified that he had a conversation with one Christian, superintendent for the defendant company, and was asked to make a sketch or preliminary drawing for a casket, which he did. At the request of Christian, LaTessa made a section of the casket out of wood and delivered it to the defendant company. He was asked by the defendant to find some company that would make a cast and found the firm of Olson & Christian Foundry Co.; that he thereupon took Mr. Christian, superintendent of the defendant company, to the Olson & Christian Co. and Christian then asked Olson whether he could do the work if he, Christian, gave him the order. It was agreed that Olson was to make the casting according to the pattern; that thereupon the plaintiff company made the pattern and delivered it to the Olson company; that the defendant, by its superintendent Christian, and the Olson & Christian Co. agreed upon the price to be paid by the defendant for the casting; that the price agreed upon between plaintiffs and defendant for the design and pattern was \$3,495, and that they had been paid on account \$1,495, leaving a balance due of \$2,000 plus the \$550 due on the December contract which was separate and apart from the original undertaking.

transcript of the same at 12,400 and judgment on the finding.

Defendant insists that the judgment is not supported by the evidence and that the court failed to make proper use of the evidence presented to the court. It is his contention that the court is obvious that the same having been tried by the court without a jury, it is necessary that matters only material to the case have been considered.

From the evidence it appears that the defendant and the witness were engaged in the business of selling and buying wheat and other grain and stock of various kinds. The defendant's company has been doing business since the defendant first started at about 1900.

Witness testified that he had a conversation with one of the defendant's employees for the defendant's company, who was asked to make a list of preliminary figures for a contract, which he did. At the request of the defendant, witness made a notation of the amount of the work and delivered it to the defendant's company. He was asked by the defendant to find some money that would make a good deal of the firm of Olson & Christian, which he did; that in December 1900, Christian, representative of the defendant's company, to the Olson & Christian Co. and Christian then asked Olson whether he would do the work at the Olson & Christian, gave him the order. It was agreed that Olson was to make the contract, according to the order; that Christian the

defendant's company was to sell and deliver it to the Olson & Christian Co. that the defendant, by the representative Christian, had the Olson & Christian Co. agreed upon the price to be paid by the defendant for the contract; that the price agreed upon between Christian and the defendant for the Olson and Christian was 12,400, and that they had paid an amount of 1,400, leaving a balance due of 11,000 plus the 1900

one on the account contract which was separate and apart from the

original contract.

Christian, on behalf of the defendant, testified that the plaintiff company had been working for the defendant for several years, but that the orders were always written out and signed by the defendant; that LaTessa showed him a sketch which he, Christian, thought looked good on paper, but that it would have to be made up in a wood section so that he could see what it looked like and that LaTessa said it would cost about \$50; that LaTessa made it up but that it was out of line and he produced another one; that he explained to LaTessa that it was important that the casket when completed should not weigh over 1300 pounds and was told that it could be done; that nothing was said about the price and that some days later LaTessa came in and said it would cost \$3,500 and that he, Christian, stated that that was pretty high, but if you can make the job look right, it will be satisfactory, but you must have it for us by June 28th, as he, Christian, was going to California to attend an Elks' Convention and wanted to have it when he got back; that LaTessa never delivered the patterns to the company, and that the job when completed, including the casting, was to be \$3,500.

Testimony was introduced on behalf of the defendant for the purpose of showing that after the casket was completed it was out of line and weighed considerably over the requisite weight and that this over-weight was caused largely by the base which was $7/8$ of an inch thick when it was supposed to be $3/8$ of an inch in thickness. Christian and other witnesses on behalf of the defendant testified to these facts and also to the fact that Olson & Christian were employed by the plaintiffs and not by the defendant and that the work was entirely unsatisfactory.

Plaintiff introduced evidence showing that the thickness of the base of the casket was only $3/8$ of an inch, and that it answered all of the requirements of the agreement. Plaintiff produced

Christians, on behalf of the defendant, testified that the plaintiff company had been working for the defendant for several years, but that the orders were always written out and signed by the defendant; in a letterhead record him a letter from the defendant, thought looked good on paper, but that it would have to be made up in a word section as that he could see that it looked like and that Latessa said it would cost about \$50; that Latessa made it up but that it was out of line and he produced another one; that he explained to Latessa that it was important that the order when completed should not weigh over 1500 pounds and was told that it could be done; that nothing was said about the price and that some days later Latessa came in and said it would cost \$2,500 and that he, Christian, stated that that was pretty high, but if you can make the job last night, it will be satisfactory, and you must have it for me by June 15th, as he, Christian, was going to California to attend an office conference and wanted to have it when he got back; that Latessa never delivered the patterns to the company, and that the job when completed, including the setting, was to be \$2,500.

Testimony was introduced on behalf of the defendant for the purpose of showing that after the order was completed it was out of line and weighed considerably over the specified weight and that this over-weight was caused largely by the fact that the thickness of each block when it was supposed to be 3/4 of an inch in thickness. Christian and other witnesses on behalf of the defendant testified to these facts and also to the fact that when a Christian was employed by the plaintiff's company was by the defendant and that the work was entirely unsatisfactory.

Plaintiff introduced evidence showing that the thickness of the ends of the product was only 3/8 of an inch, and that it entered all of the requirements of the agreement. Plaintiff produced

in evidence certain advertisements in the Embalmers' Magazine for June and August, 1928, which were apparently inserted and paid for by the defendant company, showing a copy of the casket according to the design of the plaintiffs, together with certain laudatory expressions about its beauty and that it would still be another month before it would be ready to be shown to the numerous friends and customers of the defendant company.

It also appears from the record that the defendant corporation started suit against Olson & Christian based upon the transaction of the defendant company with Olson & Christian.

While the records of *The Merit Company v. Olson & Christian* case were not introduced in evidence, so far as disclosed by the abstract of record, nevertheless, this information can easily be gleaned from the testimony of the attorney for defendant when he was placed upon the stand. All of this evidence was before the trial court and that court had the opportunity of seeing and observing the witnesses and was in a much better position to weigh the testimony than is this court.

There is evidence on the part of the plaintiffs to sustain the finding and this court can not say that the finding is manifestly against the weight of the evidence.

The judgment of the Municipal Court is, therefore, affirmed.

JUDGMENT AFFIRMED.

HEBEL, P.J. AND FRIEND, J. CONCUR.

in evidence certain advertisements in the "Independent", magazine for June and August, 1935, which were apparently inserted and paid for by the defendant company, showing a copy of the contract according to the design of the plaintiff, together with certain laudatory expressions about its beauty and that it would still be another month before it would be ready to be shown to the numerous friends and customers of the defendant company.

It also appears from the record that the defendant corporation started suit against Olson & Christian based upon the transaction of the defendant company with Olson & Christian. While the records of the suit Company v. Olson & Christian were not introduced in evidence, so far as disclosed by the report of record, nevertheless, this information can easily be gleaned from the testimony of the attorney for defendant when he was placed upon the stand. All of this evidence was before the trial court and that court had the opportunity of seeing and observing the witnesses and was in a much better position to weigh the testimony than is this court.

There is evidence on the part of the plaintiffs to sustain the finding and this court can not say that the finding is manifestly against the weight of the evidence.

The judgment of the Municipal Court is, therefore,

affirmed.

UNOCTOBER TWENTY.

WILLIAM J. AND JAMES J. JONES.

35529

WILLIAM C. DIERCKS,
Plaintiff- Appellant,

v.

HERMAN SCHUESSLER, JR., and
JULIUS WEISS,

Defendants-Appellees.

1007
APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

265 I.A. 611²

Opinion filed March 16, 1932

MR. JUSTICE WILSON DELIVERED THE OPINION OF THE COURT.

Plaintiff confessed judgment on a lease July 11, 1925, for the sum of \$2,905, and costs, against the defendants Herman Schuessler, Jr. and Julius Weiss. The judgment was opened up on the petition of the defendant Herman Schuessler and also the petition of Julius Weiss and leave was given both defendants to appear and defend. The cause proceeded to trial before the court and jury, resulting in a verdict against the plaintiff, from which judgment an appeal was taken to this court and the cause reversed and remanded for a new trial. The opinion in this court is found in the case of Diercks v. Schuessler, et al, 252 Ill. App. 648. (Not reported in full). The lease in question was executed May 18, 1923, and extended from June 1, 1923, until April 30, 1928. The lessor was William C. Diercks and the lessees, the defendants Herman Schuessler and Julius Weiss. The instrument was under seal and signed by all the parties.

August 1, 1923, Julius Weiss assigned his interest in the lease to Paul Klank and Paul Weiss and this assignment was consented to by the lessor. The consent to the assignment, however, contained a provision that the assignor should remain liable for the prompt payment of the rent and performance of the agreement. The petitions filed by the defendants in the original proceeding to vacate the judgment charged that the plaintiff consented to the acceptance of Julius Weiss as exclusive tenant of the premises and

WILLIAM O. BIRCKBECK,
Plaintiff-Appellant,
v.
JULIUS WEISS,
Defendant-Appellee.

2001 A. 611

Opinion filed March 16, 1938

THE JUSTICE COURT, DELAWARE COUNTY, PENNSYLVANIA, in its opinion in the case of Julius Weiss v. William O. Birckbeck, No. 111, 1938, (not reported in full). The lease in question was executed May 15, 1937, and extended from June 1, 1937, until 30, 1938. The lease was between William O. Birckbeck and the defendant, Julius Weiss. The lease was under seal and signed by all the parties. On August 1, 1937, Julius Weiss paid the rent for the lease to Paul Blank and Paul Weiss and this payment was accounted for by the lessor. The consent to the assignment, however, contained a provision that the assignor should remain liable for the prompt payment of the rent and performance of the agreement. The petition filed by the defendant in the original proceeding to vacate the judgment showed that the plaintiff consented to the assignment of Julius Weiss as exclusive tenant of the premises and

for the sum of \$2,800, and costs, against the defendant Weiss. The judgment was opened up on the petition of the defendant Weiss and also the petition of Julius Weiss and leave was given both defendants to appear and defend. The cause proceeded to trial before the court and jury, resulting in a verdict against the plaintiff, from which judgment an appeal was taken to this court and the cause reversed and remanded for a new trial. The opinion in this court is found in the case of Birckbeck v. Weiss, No. 111, 1938.

in the case of Birckbeck v. Weiss, No. 111, 1938, the court held that the lease in question was executed May 15, 1937, and extended from June 1, 1937, until 30, 1938. The lease was between William O. Birckbeck and the defendant, Julius Weiss. The lease was under seal and signed by all the parties.

to the assignment by Julius Weiss to Paul Weiss and Paul Klank, and that by reason of the conduct of the plaintiff in the acceptance of a new tenant there was a surrender of the said lease of petitioners and that thereby the petitioners were released from any liability for rent under the lease. There was no claim in the original petitions filed in the cause, of any oral release or abandonment of the leasehold by parol. This court in its opinion in the case on the original appeal held: (Pieroke v. Schuessler, et al, Gen. No. 33,059, page 4.)

"The attempt of defendants to claim a surrender of the premises, resting entirely in parol, is inadmissible to change or vary the contract of the parties in writing under seal. Furthermore such evidence was not admissible under the pleadings. On abandonment by the tenant a landlord taking possession of the demised premises under the covenants of the lease such taking possession will not operate to release the leasees from the payment of subsequently accruing rent. Grosser v. St. Paul Trust Co., 147, ibid. 634; Barnes v. Northern Trust Company, 169 ibid. 112."

Upon the re-docketing of the cause in the Municipal Court, after reversal here, petitioners filed a new and amended affidavit of merits in which it was stated:

"That the lease upon which this suit is brought was surrendered by the defendants and such surrender was accepted by the plaintiff and said lease thereupon cancelled on June 4, 1923.

"That an attempt was made to assign this surrendered lease about August 1st, 1923, to Paul Klank and Paul Weiss."

In the original proceeding the defendants relied upon the fact as charged in their petition that they were released by operation of law because of the fact that the lease was assigned to Paul Klank and Paul Weiss and rent paid by them. No mention was made of any surrender based upon a parol agreement between the parties. Upon the reversal of the cause, defendants shifted their ground and attempted to show that the assignment was, in fact, a void assignment and that the lease was abandoned by mutual agreement

to the assignment by Julius to Paul Klein and Paul Klein, and that by reason of the conduct of the plaintiff in the acceptance of a new tenant there was a surrender of the said lease of petition-ers and that thereby the petitioners were released from any liability for rent under the lease. There was no claim in the original petition filed in the court, of any oral release or abandonment of the leasehold by parcel. This court in its decision in the case on the original appeal held: (Decker v. Hahnemann, et al., Gen. Co. 25,000, page 4.)

"The theory of defendant's claim is that the premises, existing entirely in parcel, is abandoned to the plaintiff or by the contract of the parties in writing under seal. Furthermore such evidence was not admitted under the pleadings. On abandonment by the tenant a landlord taking possession of the premises under the contract of the parties such evidence will not operate to release the lease from the payment of subsequently accruing rent. (Decker v. Hahnemann, et al., Gen. Co. 25,000, page 4.)"

Upon the repleading of the cause in the Municipal Court, after reversal here, petitioners filed a new and amended affidavit of merits in which it was set forth:

"That the lease upon which this suit is brought was entered by the defendant and was amended and accepted by the plaintiff and said lease thereon was cancelled on June 4, 1931. "That an attempt was made to assign this lease to Paul Klein and Paul Klein and Paul Klein, to Paul Klein and Paul Klein."

In the original repleading the defendant relied upon the fact as charged in their petition that they were released by operation of law because of the fact that the lease was assigned to Paul Klein and Paul Klein and Paul Klein, as mentioned and made of any surrender based upon a party agreement between the parties. Upon the reversal of the cause, defendant shifted their ground and attempted to show that the assignment was, in fact, a void assignment and that the lease was abandoned by Paul Klein

between the parties. Parties defendant are not permitted to change their defense to suit the occasion. Cronk, et al v. Trumble, 66 Ill. 428; 33 Corpus Juris 330.

Schuessler testified that on or about May 27, 1923, he had a conversation with Dieroks with regard to the occupancy of the premises and that Dieroks said that he did not care to have him in the premises and he said he would release him, Schuessler, as to the chattel mortgage and the lease if he would get out.

Julius Weiss testified that on or about June 3, 1923, he heard Dieroks and Schuessler talking and that Schuessler asked Dieroks if he wanted to get rid of him and Schuessler said that if he wanted to he could release him from the lease and he would go, and Dieroks said to go ahead. Both of these parties were interested parties and both when asked whether or not they had signed the original petitions to have the first judgment vacated, stated under oath that they did not know whether they had signed them or not; that they had not read them and that they did not know what was in the petition. Their minds appeared to be a blank as to anything that was contained in the original petitions in which no statement was made as to the agreed abandonment of the premises, but which relied solely upon the abandonment as a proposition of law by reason of the acts of the parties in making the assignment. Such testimony is thoroughly unreliable. ^{Defendant's} ~~Plaintiff's~~ counsel took the stand as a witness in their behalf. This in itself was contrary to the rule that an attorney should not testify in a proceeding in which he was actually participating. This same counsel also stated under oath that he did not know whether he prepared the documents and did not know whether the defendant Weiss knew what was in the petition and did not discuss with Weiss what was in his petition. The record, however, discloses that he acted as the notary public in

between the parties. Parties defendant are not permitted to examine their business to suit the occasion. Wright et al v. Wright, 65 Ill.

441; 18 O'Connor 441; 18 Ill.

Defendant testified that on or about May 27, 1922,

he had a conversation with Elmore with regard to the occupancy of the premises and that Elmore said that he did not care to have him in the premises and he said he would witness him, defendant, as to the character of the premises and the lease if he would get out.

Julius Weiss testified that on or about June 2, 1922,

he heard Elmore and defendant talking and that defendant asked Elmore if he wanted to get rid of the premises and defendant said that it was wanted to be sold and he said that the lease was not wanted.

and Elmore said to go ahead. Both of these parties were interested parties and both were heard and both of them said that the

original petition to have the first judgment vacated, stated that

with that they did not know whether they had signed same or not;

that they had not read them and that they did not know what was in

the petition. Their minds appeared to be in a blank as to signing

that was contained in the original petition in which no statement

was made as to the signed statement of the petition, but which

relied solely upon the statement as a petition of law by

recital of the acts of the parties in making the statement. Such

testimony is thoroughly inadmissible. ^{See} Wright et al v. Wright took the

stand as a witness in their behalf. This in itself was contrary

to the rule that an attorney should not testify in a proceeding in

which he was actually participating. This same counsel also stated

under oath that he did not know whether he signed the documents

and did not know whether the defendant knew what was in the

petition and did not discuss with Weiss what was in the petition.

The record, however, discloses that he acted as the history pulled in

taking Weiss' acknowledgment. The fact that these defendants were willing to swear to a document without knowing what it contained does not add to their reliability. There was, moreover, no consideration for the claimed release.

Diercke denied ever having had any conversation with either of the defendants in which it was mutually agreed that the premises were to be abandoned. This court in the case of Thompson v. Western Casket Co. 219 Ill. App. 184, in its opinion says:

"We think it must be conceded that the lease made a prima facie case for the plaintiffs and that the burden was on the defendant to show the truth of the only matter relied on by way of defense, which was that for a mutual consideration the lessor Thompson agreed to and did cancel the written lease, and let and rent the premises to the Western Casket and Undertaking Company. There is no evidence that the lease was canceled by any express agreement either oral or written. The lease was in the possession of plaintiffs and was put in evidence by them at the trial. It is apparently in the same physical condition as at the time it was executed and delivered. It is significant that it was neither delivered up nor physically changed at any time.

In this State a written lease, although under seal, may be surrendered by verbal agreement of the parties to it. Baker v. Pratt, 15 Ill. 568. It is also true that an agreement of this nature may be inferred from the conduct of the parties to the lease. Fry v. Pattidge, 73 Ill. 51; Williams v. Vanderbilt, 145 Ill. 246; Dilla v. Stobie, 81 Ill. 202. But this rule is based upon the principles of estoppel and the conduct proved must be such as is inconsistent with the continuance of the relation of landlord and tenant. Grommes v. St. Paul Trust Co., 147 Ill. 634; Johnson v. Northern Trust Co., 285 Ill. 370; Beall v. White, 94 U. S. 382; Ross v. Lowy, 57 Minn. 381."

In the case at bar as in the case quoted, the lease was still in the possession of the plaintiff and there is no evidence of its surrender. In the event there had been an abandonment of the property by mutual agreement, it would have been simple to have marked the lease canceled as to one or both of the defendants or to have surrendered the lease and executed a new one. While such an instrument may be surrendered by parol, nevertheless, the evidence concerning such a surrender should be clear or accompanied by such acts as would indicate the surrender, such as a cancellation of the lease, surrender of the property, a valid consideration, or

taking into account, acknowledged, the fact that these defendants were
willing to swear to a document without knowing what it contained
does not add to their reliability. Their case, however, no
consideration for the claimed release.

There is denied ever having had any conversation with
either of the defendants in which it was actually agreed that the
premises were to be abandoned. This occurs in the case of Thompson

v. Western Trust Co., 219 Ill. App. 184, in its opinion says:

"We think it must be conceded that the lease was a
prime factor in the plaintiff's case and that the burden
was on the defendant to show the truth of the only matter
relied on by way of defense, which was that for a certain
consideration the lease Thompson agreed to and his counsel
the written lease, and that the parties to the
Western Trust Co. and Underwriting Company. There is no evidence
that the lease was canceled by any express agreement either
oral or written. The lease was in the possession of plain-
tiff and was put in evidence by them at the trial. It is
apparently in the same physical condition as at the time
it was executed and delivered. It is difficult to say if
was neither delivered nor was physically changed at any time.
In this state a written lease, although under
seal, may be surrendered by verbal agreement of the parties
to it. Miller v. Miller, 12 Ill. 352. It is also true that
an agreement of this nature may be inferred from the conduct
of the parties to the lease. Ill. v. Miller, 73 Ill. 211.
William v. Underwriting, 125 Ill. 340; Miller v. Miller, 31
Ill. 302. But this rule is based upon the principles of
evidence and the conduct proved must be such as to inconsistent
with the contents of the relation of landlord and tenant.
Quinn v. St. Paul Trust Co., 147 Ill. 604; Thompson v.
Western Trust Co., 219 Ill. 180; Miller v. Miller, 31 Ill.
384; Miller v. Miller, 31 Ill. 381."

In the case at bar as in the case quoted, the lease
was still in the possession of the plaintiff and there is no evi-
dence of its surrender. In the event there had been an abandonment
of the property by mutual agreement, it would have been also to
have marked the lease cancelled as to one or both of the defendants
or to have surrendered the lease and executed a new one. While
such an instrument may be surrendered by parol, nevertheless, the
evidence concerning such a surrender should be clear or supported
by such facts as would indicate the surrender, such as a cancellation
of the lease, surrender of the property, a valid consideration, or

some such fact as would evidence the intention.

The defendant Weiss admitted that he paid the sum of \$360 per month as rental on the premises for the months of July and August.

The defendant Schuessler testified that he occupied the premises until June 4, 1923.

After the defendants refused to pay the rent, plaintiff had the right to rent the premises for so much as he was able to obtain and to hold the defendants for the balance.

We have not been aided in our consideration of the cause by briefs filed on behalf of the defendants. They have not followed the appeal to this court. The burden of proof was on the defendants to show a surrender of the lease. Considering the fact that the defendants have abandoned the defense originally made by them in the first proceeding in the Municipal Court, together with the fact that the evidence of the defendants is of such an unsatisfactory character, we are of the opinion that the defendants have wholly failed to meet this requirement by proving a surrender of the premises under an oral agreement, by a preponderance of the evidence. The judgment of the Municipal Court is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

HEBEL, P.J. AND FRIEND, J. CONCUR.

some such fact as would vitiate the intention.

The defendant also admitted that he paid the sum of \$350 per month as rental on the premises for the months of July and August.

The defendant further testified that he occupied

the premises until June 4, 1938.

After the defendant refused to pay the rent, plaintiff had the right to rent the premises for as much as he was able to obtain and to hold the defendants for the balance.

We have not been aided in our consideration of the cause by briefs filed on behalf of the defendants. They have not followed the usual form to this court. The burden of proof was on the defendants to show a surrender of the lease. Considering the fact that the defendants have abandoned the defense originally made by them in the first proceeding in the Municipal Court, together with the fact that the evidence of the defendants is of such an unimpeachable character, we are of the opinion that the defendants have wholly failed to meet this requirement by proving a surrender of the premises under an oral agreement, by a proctorship of the evidence. The judgment of the Municipal Court is reversed and the cause remanded for a new trial.

REVEREND AND HONORABLE.

HENRY, J. and WILSON, J. CONCUR.

57
AT A TERM OF THE APPELLATE COURT

Begun and held at Ottawa, on Tuesday, the second day of February, in the year of our Lord one thousand nine hundred and thirty-two, within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.

Hon. FRED G. WOLFE, Justice.

Hon. JAMES S. BALDWIN, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

265 I.A. 611³

BE IT REMEMBERED, that afterwards, to-wit: On

FEB 2 1932 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

October Term, A.D. 1930

JOHN A. LOGAN WARREN
Appellee,

vs.

JUDD VAN SICKLE, ALBERT E.
SWINSON, GEORGE FRITZ,
EDGAR BEST and HENRY GRAHAM,
Appellants

Appeal from the
Circuit Court of
Winnebago County.

Jett, P. J.

An action on the case was brought by appellee in the circuit court of Winnebago County against appellants, Sylvia Sodaman and Wallace Best, for libel. Sylvia Sodaman and Wallace Best were thereafter dismissed out of the case.

The declaration contained two original counts and an additional count. The first count was withdrawn. The second count avers that appellee was a person of good name, credit, reputation, etc., having a wife with whom he was then living; that he had been for some twelve years an ordained minister in the Methodist Episcopal Church; that he had been the pastor of the Methodist Church in the village of Durand for a perior of two years; that by virtue of such position he had acquired a large acquaintanceship; that appellants "conspiring and wrongfully and maliciously intending to injure and destroy his good name and reputation and to bring him into public hatred, contempt, ridicule, and disgrace," etc., met with one N. E. Lamb in said village and "did there induce the said N. E. Lamb to go with said defendants to C. K. Carpenter, District Superintendent of the Methodist Episcopal Church * * * and did then and there compose and publish "a certain false, scandalous, malicious

and defamatory libel" as follows:

"May 21, 1927

"To Bishop Edwin Holt Hughes:

"I, N. E. Lamb, a member of the Methodist Episcopal Church in Durand, and also recording steward of the Quarterly Conference, wish to prefer charges of adultery against our pastor, the Rev. J. A. L. Warren, and hereto append the testimony of my daughter, Hazel Lamb, as evidence of the same.

"I also wish to charge him with conduct unbecoming a minister since this matter has become known, in his attitude to my family and to the church.

"As a result of such unbecoming conduct, the great majority of the church refuses longer to follow his leadership, and his pastorate ought to be terminated immediately."

The count also avers that said charge was delivered to Carpenter at the request of appellants, and was by him sent to Bishop Hughes; that appellants also caused one Hazel Lamb to make an affidavit, which was attached to said written charge and presented as a part thereof to the said Carpenter, which affidavit contained a statement to the effect that appellee had had sexual intercourse with said Hazel Lamb; that appellants "well knew, prior to the making of said statement and said formal charge before the said G. K. Carpenter, that said statement and the accusations contained in said written charge, were utterly false, untrue and without foundation of any kind or character," averring damages, etc.

The additional count is practically the same as the second, except that it charges that appellants procured Hazel Lamb to appear before a notary public and sign and swear to an affidavit, a copy of which is set forth in the additional count and recites at great length and with much detail, a story of her alleged intimacy with appellee covering a considerable period of time and under circumstances calculated to degrade a minister and destroy his reputation and usefulness.

Said additional count further averred that a church

and "Lobby" as follows:

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OT 1920-21 100-100000

1. The first of the two is a "copy" of the original document, which is a letter from the "Director of the Bureau of the Census" to the "Director of the Bureau of the Interior" dated "January 1, 1911".

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pastor, the Rev. J. A. H. [unclear], in [unclear] [unclear] the testimony

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1. Minister since 1960, he has been a member of the

...not at all likely to be

fact, not, however, at the time of the trial.

100-443887-100

ship, and his restoration ought to be hastened immediately."

[illegible]

of the interest of the Government in the subject of the

and I am sure of only a few things: that I am not alone in my feelings, and that I am not alone in my hopes.

...the matter of the

relief, concerned him a lot at present time. He is interested in

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and sexual intercourse with cold level 1 job; that would be

"Well, here's the letter to the editor, and now"

[illegible]

Adrian Dina ni benihanan pambayaran ang pag-inyesta

On 11-10-1961, the following were arrested, and held in custody, at the
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of my kind or character, which I have been

The additional cost of the additional 100,000 units is \$100,000.

James Harrison was, I think, the only one of the three, among

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It is also not in the line of duty to work in the hills

count and results of great interest to the public.

10-10-68

0-17-6 of Nat'l Defense Receipts Article which has it to protect

...the

2011 addition of a new chapter on the history of the city.

trial was held; that appellants procured the said Hazel Lamb to testify on said trial; that as a result of said testimony appellee was found guilty and was discharged from further service in said church, averring damages, etc.

To said declaration, appellants filed a plea of the general issue and a plea of justification. A trial was had, resulting in a verdict and judgment for appellee for \$10,000. To reverse said judgment this appeal is prosecuted.

The record discloses that in 1926 appellee was about 36 years of age. He had been ordained a Methodist minister in 1914 and from that time until the publications here complained of he had occupied various pastorates in the State of Illinois, coming to Durand in 1925. Durand was a village of about 500 or 600 inhabitants. In 1926 appellee's family consisted of himself and wife. At the time in question a family by the name of Lamb lived in Durand, and had for a number of years. N. E. Lamb, the head of the family, was a member and official of the church, and a janitor of the church building. His wife, Mary E. Lamb, was also a member and a teacher in the adult Sunday School. Hazel, a daughter, was in 1926 and 1927 eighteen years of age. She had recently graduated from the high school and was a member of appellee's church. In September, 1926, appellee's wife engaged Miss Lamb to work as a domestic in appellee's home. She began work on September 13th and worked intermittently until January 14, 1927, when she left appellee's home and never returned. Shortly thereafter she went to Rockford ~~xxxx~~ where she obtained employment.

Appellants contend that the occasion involved and the communication complained of were qualifiedly privileged, and the court erred in denying appellants' motion for a directed verdict, made at the close of all the evidence. In this connection appellants insist that they were officers of the church of which appellee was pastor; that as such officers they were interested in its welfare and it was their right

trial was held; that applicant purchased the said land; had
to testify in said trial; that as a result of said testimony
applicant was found guilty and was discharged from further
service in said court, evening court, etc.
To said applicant, applicant filed a plea of the
general issue and a plea of justification. A trial was had, re-
sulting in a verdict and judgment for applicant for \$10,000. The
verdict was set aside and the case is now pending.

The record discloses that in 1927 applicant was about
35 years of age. He had been married and had one child
in 1914 and from that time until the dissolution of the mar-
riage of his first marriage various residences in the State of
Illinois, having been in 1927. He was a member of
about 500 or 600 members. In 1927 applicant's family
consisted of himself and wife. At the time in question he
lived by the name of John in Chicago, and was the
owner of a house. He was a member of the church
and was a member of the church, and a member of the church
building. His wife, Mary J. Jones, was also a member and a
member in the church. He had a daughter, Mary J. Jones,
in 1927 and 1928. He had a son, John J. Jones, in 1929.
He was a member of the high school and was a member of applicant's
group. In 1927, 1928, applicant's wife entered into
work as a domestic in applicant's home. She began with
on September 1927 and worked continuously until January 1928.
1927, then she left applicant's home and never returned. There-
after she went to Chicago where she was employed.

Applicant advised that the occasion involved in
the commission of the crime was qualified by the fact
and the fact that the applicant was not a member of the
church at the time of all the evidence. In
the commission of the crime that they were officers of
the church of which applicant was a member; that as such officers
they were interested in its welfare and in its right

and duty to discuss matters of this character among themselves and with other officials. Appellee insists that the charges against him were made maliciously, and being so made, the defense of privilege cannot be availed of. He claims that the record affords ample evidence of malice and that the cause was necessarily submitted to the jury. The defendants made no effort to sustain their plea of justification. There is nothing in the evidence tending to prove the truth of the charges they made and circulated against appellee. Hazel Lamb was not a witness in either of the trials. Neither her absence nor the defendants' failure to produce her as a witness was satisfactorily explained. In view of the gravity of the charges made against appellee and their ruinous consequences to him, these facts tended strongly to prove that defendants were actuated by malice and bad faith. The defense of privilege could avail them nothing if the jury believed their conduct was prompted by malice and ill will toward appellee.

In support of his contention that the charges were maliciously made, appellee relies on the following testimony: Ralph Hoyt testified that he saw appellant Fritz on May 18, 1927; that "he phoned to me and said he wanted me to come down * * * He wanted me to go down to Lamb's and take an affidavit of Hazel's. He gave me an idea what the affidavit contained--that there had been improper relations between Hazel Lamb and the minister, or she claimed at least. * * * I was not a member of the Methodist Episcopal Church at Durand at that time."

Ralph Cole testified: "Somewhere around the latter part of May or the first of June, I had a talk with Albert Swinson. * * * We talked in reference to the question of whether or not John A. Warren had had illicit, sexual relations with Hazel Lamb. I asked Mr. Swinson if he thought there was anything to that story. Mr. Swinson told me he

and duty to disclose matters of this character among themselves
and with other officials. A witness in fact that the charges
against him were false, and being aware of the same, the
defense of privilege cannot be availed of. He states that
the record affords ample evidence of this and that the
state was necessarily admitted to the truth. The defendant
made no effort to explain this line of investigation. There
is nothing in the evidence tending to prove the truth of
the charges they who and others had a right to know. He
had not a witness in fact of the charges. Other than
absence from the defendant's failure to produce him as a
witness was satisfactorily explained. In view of the gravity
of the charges made against himself and their witnesses
consequently to him, these facts tended strongly to prove
that defendant was not guilty by reason of the fact that
the defense of privilege would avail them nothing if the
jury believed their conduct was justified by reason and
ill will toward applicant.

In answer to the contention that the charges were
maliciously made, applicant relies on the following testi-
mony: Ralph Wiley testified that he saw applicant with
May 18, 1927; that he showed to me and said he wanted me
to come down * * * He stated we were to have a hearing
and take an affidavit of H. Wiley. He gave me a list of names
the affidavit contained--that there had been improper
relations between Havel and the witness, on the witness
at least. * * * I was not a member of the Methodist Church
at that time.

Ralph Wiley testified: "Somewhere around the latter
part of May or the first of June, I had a talk with Albert
Swinson. * * * We talked in reference to the charges of
whether or not John A. Havel had had illicit sexual rela-
tions with Havel. I asked Mr. Swinson if he thought
there was anything to that charge. Mr. Swinson told me he

thought there was. I asked Mr. Swinson how he knew this could be true about Mr. Warren and he said that was his trouble at Winnebago; that was the reason he was drove out of Winnebago."

Appellee testified among other things, that on May 14, 1927, appellants Van Sickle and Swinson, with Everett Derwent, came to his home about half past eight, and in the presence of appellee's wife, "Mr. Derwent spoke first and said, 'There is a persistent rumor that the minister has been going to bed with the hired girl.' I said 'You may proceed.' Then he said, 'I have heard it said that no man's reputation can survive a woman's attack.' * * * I told them I wouldn't concede that. * * * Then he said, "Then you are going to receive a great deal of unfavorable publicity.' At that time Judd Van Sickle said, 'We will see that you do get it.' * * * I said to Mr. Derwent, 'The story is based on a foundation of lies and you haven't any right to go on telling it.' Mr. Swinson said to me, 'So you deny the charge.' I said, 'I do.' He said 'But you will have to leave Durand.'"

Appellee further testified that he had a conversation with appellant Best on May 20, 1927: that Best "said to me, 'Carpenter will give you a clean bill of health if you will leave Durand now.' I said, 'I would not consider any proposition that did not have as its first element a complete, voluntary denial on the part of Hazel Lamb.' He said, 'I think that can be arranged all right.'"

The evidence is also to the effect that, in August, 1926, when the Methodist Church at Durand was being rebuilt, there was some disagreement between appellee and appellants Fritz and Graham as to the character and progress of said work and that thereafter appellant Graham refused to speak to appellee for two or three weeks. There was also testimony that appellant Swinson went to the office of the Rockford Daily Register Gazette on May 25, 1927, and read the proofs of an article concerning the alleged intimacy between appellee and Hazel Lamb, which was submitted to him by the editor for verification, and that he

[illegible]

stated in substance that the facts there given were correct.

On a motion for a directed verdict at the close of all the evidence, it is only necessary to determine whether the evidence, taken in its most favorable light toward the plaintiff's case, fairly tends to prove it. Without going into a discussion of the evidence, it clearly discloses that the court would not have been warranted in directing a verdict in favor of appellants.

It is next insisted that the verdict of the jury is against the manifest weight of the evidence. While the burden is on appellee to prove that appellants were actuated by malice, in determining that question the jury have the right to consider not only the oral testimony, but also the publications themselves. (Wharton v. Wright, 30 Ill. App. 343, citing Odger on Slander and Libel, 270, 271, 276 and 280; Elam v. Badger, 23 Ill. 498; Ambrosius v. O'Farrell, 119 Ill. App. 365; Barth v. Hanna, 158 Ill. App. 20.) Under the foregoing authorities, it follows that the verdict of the jury on the question as to whether appellants were actuated by malice is not against the manifest weight of the evidence. Counsel for appellants contend that even though the verdict is not against the manifest weight of the evidence as to certain defendants, as to others, it is. In view of the evidence above set forth, this point is not well taken. In matters of this character, where parties act in concert in making or causing to be made a publication, the act of one is the act of all. (Johnson v. Barber, 10 Ill. 425; Clay v. People, 36 id. 147; Newell on Slander and Libel, 4th Ed. page 232.) Appellants position is also untenable for the further reason that they did not submit an instruction or form of verdict authorizing the finding of certain of the defendants guilty and others not guilty.

It is also urged by counsel for appellants that the statement in their fourteenth instruction that "the jury has no right and should not find or infer from the language used and statements contained in the affidavit of Hazel M. Lamb, introduced in evidence, that the defendants or any of them

stated in substance that the facts there given were correct.

On a motion for a directed verdict at the close of

all the evidence, it is only necessary to determine whether

the evidence, taken in its most favorable light toward the

plaintiff's case, fairly tends to prove it. Without going into

a discussion of the evidence, it clearly discloses that the court

would not have been warranted in directing a verdict in favor

of defendant.

It is next stated that the verdict of the jury

is against the manifest weight of the evidence. While the

burden is on appellee to prove that appellants were negligent by

negligence, in determining that question the jury have the right to

consider not only the oral testimony, but also the written evidence

therein. (Horton v. Smith, 30 Ill. App. 327, citing other

on appeal and held, 270, 271, 272 and 280; Ellis v. Smith, 27 Ill.

483; Johnson v. Smith, 118 Ill. App. 107; Smith v. Smith,

120 Ill. App. 40.) Under the foregoing authorities, it follows that

the verdict of the jury on the question as to whether appellants

were negligent by Alice is not against the manifest weight of

the evidence. Counsel for appellants contend that even though

the verdict is not against the manifest weight of the evidence

as to certain defendants, as to others, it is. In view of the

evidence above set forth, this point is not well taken. In

matters of this character, where parties act in concert in making

or causing to be made a publication, the act of one is the act

of all. (Johnson v. Smith, 118 Ill. App. 107; Gray v. People, 32 Ill.

147; Lewis v. Smith and Smith, 147 Ill. App. 327.) Appellants

position is also untenable for the further reason that they did

not submit an instruction or form of verdict authorizing the

finding of certain of the defendants guilty and others not guilty.

It is also urged by counsel for appellants that the

statements in their fourth instruction that the jury has

no right and should not find or infer from the language used

and statements contained in the affidavit of John W. Smith,

introduced in evidence, that the defendants or any of them

were guilty of any express or actual malice toward the plaintiff Warren", was a correct statement of law and that the instruction "in order to establish malice on the part of the defendants the plaintiff is not confined to matters outside of the alleged defamatory publication, but you may consider among other things the words of the publication themselves, and the circumstances attending the publication thereof" was erroneous and in conflict therewith.

Upon the holding of the Supreme and Appellate Courts in *Elam v. Badger*, supra; *Wharton v. Wright*, supra; *Ambrosius v. O'Farrell*, supra; and *Barton v. Hanna*, supra, appellee's sixth instruction stated a correct principle of law and the court did not err in giving the same. The inconsistency complained of resulted from the giving of appellee's fourteenth instruction. Appellants are therefore not in a position to take advantage of such conflict or inconsistency. (*Warren v. Jackson*, 204 Ill. App. 576; *Conover v. Wabash Ry. Co.*, 208 id. 105; *Bollenbach v. Bloomenthal*, 255 id. 305.)

In support of their contention that the verdict is against the manifest ~~wix~~ weight of the evidence, appellants urge, among other things, that they had nothing to do with procuring the charge signed by N. E. Lamb or the affidavit signed by his daughter Hazel. Appellee's testimony concerning the conversation had between him and appellant, Best, on May 20, 1927 in which he proposed to give appellee a clean bill of health if he would leave Durand was not denied by Best and appellee's testimony on that subject tends to show that appellants held themselves out as having control over all matters pertaining to the charges against appellee.

While appellants all testified that in doing what they did in connection with the publications complained of, they did so from proper motives and as officers of said church board, and that they bore no malice toward appellee in connection therewith, their testimony is not conclusive on that question, but is to be considered, together with all the other evidence in the case, including the charges themselves, by the jury in determining as to whether appellants were actuated by malice as charged. Two

255 1st 205.)

In support of their contention that the verdict is against the weight of the evidence, appellants urge, among other things, that they had nothing to do with procuring the charge signed by W. E. Lamb or the affidavit signed by his daughter Hazel. Appellee's testimony concerning the conversation had between him and appellee, east, on May 20, 1937 in which he proposed to give appellee a clean bill of health if he would leave Durand was not denied by West and appellee's testimony on that subject tends to show that appellee told themselves not to having control over all matters pertaining to the charges against appellee. While appellee did testify that in doing that they did in connection with the application completed by, they did so from proper motives and as officers of said court house and that they bore no malice toward appellee in connection therewith, their testimony is not conclusive on that question, but is to be considered, together with all the other evidence in the case, including the charges themselves, by the jury in determining as to whether appellee's were actuated by malice as charged. Two

juries have found against them on this question. Both trials resulted in a verdict in favor of appellee. The first verdict was for \$20,000. Where the evidence is conflicting and two juries have heard it and found the facts the same way, and there is no evidence fairly tending to sustain the findings, the judgment will not be reversed on the facts.' (Phelan v. DeKalb Wagon Co., 119 Ill. App. 519; Kirk v. Meinschausen, 119 id. 522; Meier v. Chicago C. C. & St. L. Ry. Co., 308 id. 236; Merrill v. Merrill, 215 id. 602; Bates v. Danville St. Ry. & Light Co., 190 id. 486; Romano v. Rickford City Traction Co., 230 id. 402.)

"The general rule is that in penal actions and in actions for a libel or defamation, and other actions vindictive in their nature, a new trial will not be granted merely because the verdict is against the weight of the evidence." (Clark v. Hatfield 88 Ill. 440; citing Jarvis v. Hathaway, 3 Johns. 180; Rundle v. Butler, 10 Wendl. 119; Townsend on Slander, 424, 2nd Ed; Sheen v. Peoria Journal Co. 53 Ill. App. 267.) Following the reasoning of the foregoing authorities, we would not be warranted in reversing a judgment on account of the weight of the evidence.

Certain witnesses on behalf of appellee testified over objection to the effect that the attendance at the church services and in the Sunday School had increased during the pastorate of appellee. There was no substantial error in this ruling, as appellee had the right to submit evidence to the jury with reference to his work as a pastor. This evidence further tended to refute the statement in the charge signed by N. E. Lamb that "the great majority of the church refuses longer to follow his leadership", and tended to show that such statement was not made in good faith.

It is insisted that the court erred in admitting certain photographs and testimony to the effect that appellee performed manual labor in the construction of the new church. There was no substantial error in this ruling, especially as there was testimony

tending to show that there was friction between appellee and certain members of the board in connection therewith.

It is also insisted that the court erred in permitting Clinton Wright to testify, over objection, that in May 1927 he was sitting in his car south of the church; that appellant Van Sickle came along and that he said to him, "Get in the car, Judd, and talk"; that Van Sickle got in the back seat and that he said to him, "Judd, it seems to me there is a big mistake being made here"; that in reply thereto Van Sickle said, "You will think differently later on". He further testified that he called attention to N. E. Lamb, who was standing on the church steps, and said to Van Sickle, "See Mr. Lamb standing up there on the church steps. I fail to see any sorrow on his face or countenance whatsoever"; and that Van Sickle replied, "You have to make allowance for Mr. Lamb." Taken in connection with the reply of Van Sickle, we think this evidence was competent to go to the jury on the issue of whether Van Sickle had reasonable grounds to believe the truth of the charges. It is further insisted that the court erred in refusing to allow N. E. Lamb to answer the question "Will you please give the reason why you did not go and make complaint?" having to do with making a complaint earlier than he did. The court did not err in this ruling.

The court did not err in refusing to allow appellant to show the result of the church trial, and that appellee had been dismissed. Appellants did not attempt to support their plea of justification. Evidence tending to prove that the publications were true was not admissible under the plea of not guilty. Under that plea, appellants could show they believed the charges to be true, and that they acted in good faith. (Commercial News Co. v. Bland, 116 Ill. App. 501; O'Malley v. Illinois Pub. & Print. Co., 194 id. 544; Regnier v. Cabot, 2 Gilm. 34; Sheahan v. Collins, 20 Ill. 325; Strader v. Snyder, 37 id. 404; Thomas v. Dunaway, 30 id. 373; Spolek Denni Hlasatel v. Hoffman, 204 Id. 532.)

It is also insisted that the court erred in refusing to allow appellants to make proof, by cross examination of appellee and by documentary evidence, that appellee had

three other pending suits for libel, growing out of this same transaction. The court did not err in this ruling. (People v. Strauch, 247 Ill. 220.)

It is also insisted that the court erred in admitting in evidence, over objection, a portion of the discipline of the Methodist Episcopal Church. Appellants offered certain sections of said discipline in evidence, under stipulation "that a printed volume marked 'Defendant's Exhibit 1' contains the rules, regulations and discipline of the Methodist Episcopal Church as they existed at the time of the matters involved in this suit." Having made said stipulation and having offered in evidence certain portions of said volume, appellants are not in a position to contend that the court erred in admitting the portion offered by appellee.

Lastly, it is insisted that the court erred in giving appellee's second, fourth, fifth and sixth given instructions.

Appellee's second instruction is as follows: "The court instructs the jury that the testimony of Mary E. Lamb as to what she had been told by Hazel M. Lamb concerning her relations with the plaintiff, and the testimony of H. E. Lamb as to what Mary E. Lamb told him, that Hazel M. Lamb had told her (Mary E. Lamb) concerning her (Hazel M. Lamb's) relations with the plaintiff and all the testimony as to what Hazel M. Lamb told as to her relations with the plaintiff, was not permitted in evidence by the court as tending to prove the guilt or innocence of the plaintiff, John A. Warren, as to the matter of whether he committed adultery with Hazel M. Lamb, but said testimony was allowed and permitted in evidence as only bearing on the question of privilege and motive, in the publishing, or causing to be published, of the libelous articles alleged by the plaintiff to have been published by the defendants of and concerning the plaintiff."

It is insisted that by this ~~in~~ instruction the court unduly limited the testimony of the witnesses mentioned therein. In view of the fact that no attempt was made to substantiate the averments of the plea of justification, the court did not err in this ruling.

these facts were not known at the time, and it is not
known whether the court did or did not know. (Exhibit 2.)
Exhibit 2, p. 11, 12, 13.

It is also stated that the court erred in admitting
an affidavit, an affidavit, a certificate of the
admission of the witness. The court also erred in admitting
of the admission in evidence, under the admission that a witness
voluntarily admitted that he had been in contact with the witness
and admission of the witness's admission that he had been in contact
at the time of the witness's admission in this case. The court
also erred in admitting and giving weight to the witness's admission
of the admission, and the court also erred in admitting to contact with
the court erred in admitting the admission of the witness.
Finally, it is stated that the court erred in admitting

Exhibit 2, second, third, fifth and sixth admissions.
Exhibit 2, second admission as follows: "The
court instructed the jury that the testimony of the witness
to that the witness had been in contact with the witness
with the witness, and the testimony of the witness to that
that the witness had been in contact with the witness.
Exhibit 2, third admission, that the witness had been in contact
with the witness, and the witness's admission that the witness
and the testimony of the witness to that the witness had been in contact
with the witness, and the witness's admission that the witness
court is finding to prove the fact of admission of the witness,
John A. Smith, as to the fact of admission of the witness's admission
with John A. Smith, and the witness's admission that the witness
in evidence as only being in the position of a witness and
noted to the witness, as a matter of fact, as to the
liberal admission of the witness's admission that the witness
by the testimony of the witness's admission that the witness.

It is stated that of this in testimony the court
unduly limited the testimony of the witness's admission that
in. In view of the fact that the witness was made to substantiate
the testimony of the witness's admission, the court did not
err in this ruling.

As to appellee's fourth and fifth given instructions, it is insisted that the court erred in informing the jury that if the statements in question were made with malice, that then the qualified privilege would be lost. It is contended that the statements should have been "actual or express malice". Neither of these instructions directed a verdict. So far as objections are made to them, there was no substantial error in giving the same. In ~~number~~ numerous instructions given on behalf of appellants, the jury were specifically instructed as contended by appellants. We have already held appellee's sixth instruction stated a correct principle of law, and the court did not err in giving the same.

Finding no reversible error in the record, the judgment of the trial court will be affirmed.

Judgment affirmed.

of the trial court will be affirmed.

STATE OF ILLINOIS.

SECOND DISTRICT

} ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and thirty-_____

Clerk of the Appellate Court

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the second day of February, in
the year of our Lord one thousand nine hundred and thirty-two,
within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.

Hon. FRED G. WOLFE, Justice.

Hon. JAMES S. BALDWIN, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

265 I.A. 611⁴

BE IT REMEMBERED, that afterwards, to-wit: On

FEB 18 1932 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

McWilliams Land Company,
a corporation,
appellant,

vs.

Appeal from the Circuit
Court of Livingston County.

Lake View State Bank, as
Administrator of the Estate
of D. S. Meyers, Deceased,
appellee.

JETT, P.J.

The record discloses that McWilliams Land Company, a corporation, appellant, was engaged in the business of making farm loans. In 1915 the appellant company through its officers with the consent and approval of all its stockholders, being five in number, declared a dividend amounting to \$154,000, and notes of the appellant company were issued to each stockholder for his proportionate share of the dividend. In order to provide for the payment of said dividend notes a trust agreement was entered into between the appellant company and D. S. Meyers, which agreement was approved by the stockholders. In keeping with the agreement and in accord therewith \$154,500.00, face value of the notes and mortgages belonging to the company were deposited with D. S. Meyers, trustee, as collateral for the dividend notes. The agreement among other things provided that: "D. S. Meyers, trustee, is to collect the principal and interest of said mortgages as such become due, apply the proceeds thereof to the payment of the principal and interest of the above described notes; that as the principal of the said mortgages is paid it shall be divided proportionately upon the principal of the said notes issued by the said corporation."

It appears that in 1917 the appellant company declared an additional dividend of \$49,000, and issued to each stockholder a dividend note for his pro rata share thereof and deposited with D. S. Meyers, as trustee, \$74,600, face value of its notes and mortgages as collateral to the dividend notes under the same

Williams Land Company,

a corporation,

appellant,

vs.

Lake View State Bank, as
administrator of the estate
of D. C. Meyers, deceased;
appellee.

FILED, 1.7.21

The record discloses that Williams Land Company, a corporation, appellant, was engaged in the business of making farm loans. In 1915 the appellant company through its officers with the consent and approval of all its stockholders, being five in number, declared a dividend amounting to \$124,000, and notes of the appellant company were issued to each stockholder for his proportionate share of the dividend. In order to provide for the payment of said dividend notes a trust agreement was entered into between the appellant company and D. C. Meyers, which agreement was approved by the stockholders. In keeping with the agreement and in accord therewith \$124,000.00 face value of the notes and mortgages belonging to the company were deposited with D. C. Meyers, trustee, as collateral for the dividend notes. The agreement made other things provided that: D. C. Meyers, trustee, is to collect the principal and interest of said mortgages as such become due, apply the proceeds thereof to the payment of the principal and interest of the above described notes; that as the principal on the said mortgages is paid it shall be divided proportionately upon the principal of the said notes issued by the said corporation.

It appears that in 1917 the appellant company declared an additional dividend of \$24,000, and issued to each stockholder a dividend note for his proportionate share thereof and deposited with D. C. Meyers, as trustee, \$24,000 face value of the notes and mortgages as collateral to the dividend notes under the same

appeal from the circuit
court at Livingston County.

character of an agreement as that entered into between it and said Meyers in 1915. Meyers collected on these notes and mortgages from time to time and made distribution of the proceeds of his collection to the stockholders to apply on their dividend notes. Subsequently Meyers departed this life. At the time of his death there remained unpaid on the dividend notes the sum of \$55,000, although he had collected \$16,327.00 that he had not distributed but which he had charged himself on his books. The above facts were stipulated and there is no dispute about them.

The appellant company filed a claim in the County Court of Livingston County against the estate of Meyer's for \$16,327.00 that Meyers had collected but had not distributed and asked that it be allowed as of the Fifth Class, basing its claim for such classification on the following provisions in Section 70, chapter 3, Revised Statutes. "All demands against the estate of any testator or intestate shall be divided into classes in manner following, to-wit: Fifth: Where the deceased has received money in trust for any purpose his executor or administrator shall pay out of his estate the amount thus received and not accounted for."

The County Court upon a hearing allowed the claim for \$16,327, but classified it as a Sixth Class claim. The appellant excepted to the classification and appealed to the Circuit Court.

On the hearing in the Circuit Court the claim was allowed for the said sum of \$16,327.00 but the court denied the right to priority and classified it as of the Sixth Class and not as of the Fifth Class and entered judgment against the appellant for costs. Appellant prayed for and perfected an appeal to this court.

Appellee took no exceptions to any ruling of the court nor to the allowance of the claim. It was evidently satisfied with the judgment of the court as to the classification and was not disturbed over the allowance of the claim so long as it

character of an agreement as that entered into between it and said Meyers in 1912. Meyers collected on these notes and mortgages from time to time and made distribution of the proceeds of his collection to the stockholders to apply on their dividend notes. Subsequently Meyers departed this life. At the time of his death there remained unpaid on the dividend notes the sum of \$25,000, although he had collected \$18,327.00 that he had not distributed but which he had charged himself on his books. The above facts were stipulated and there is no dispute about them.

The appellant company filed a claim in the County Court of Livingston County against the estate of Meyers for \$18,327.00 that Meyers had collected but had not distributed and asked that it be allowed as of the Fifth Class, being its claim for such classification on the following provisions in Section 70, chapter 3, Revised Statutes. "All demands against the estate of any testator or intestate shall be divided into classes in manner following, to-wit: Fifth: Where the deceased has received money in trust for any purpose his executor or administrator shall pay out of his estate the amount thus received and not accounted for."

The County Court upon a hearing allowed the claim for \$18,327, but classified it as a Sixth Class claim. The appellant excepted to the classification and appealed to the Circuit Court. On the hearing in the Circuit Court the claim was allowed for the said sum of \$18,327.00 but the court denied the right to priority and classified it as of the Sixth Class and not as of the Fifth Class and entered judgment against the appellant for costs. Appellant prayed for and perfected an appeal to this court.

Appellee took no exception to any ruling of the court nor to the allowance of the claim. It was evidently satisfied with the judgment of the court as to the classification and was not disturbed over the allowance of the claim so long as it

remained in the Sixth Class.

The errors assigned by the appellant on his appeal are; First, that the court erred in allowing the claim in the Sixth Class, when it should have been allowed as of the Fifth Class; Second, that the court erred in assessing costs to appellant; Third, that the judgment and order is contrary to the law and the evidence; and Fourth, that the court erred in not allowing the claim in the Fifth Class but allowed it in the Sixth Class.

There is no assignment of cross-errors shown by the abstract. Appellee sets out in its brief and assignment of cross-errors which he says were assigned on the record but the record does not show any exceptions or objections to any ruling or judgment of the Circuit Court on which assignment of cross-errors could be based.

In this state of the record the question for determination in this court is, "Was the claim properly classified?" ~~It was~~ If it was, the judgment against the appellant was proper. If it was not, then it should be given the proper classification and the costs should be taxed against the estate.

It is urged that the appellant has no claim but if there is a legal claim it is in favor of the holders of the dividend notes and not in favor of the land company. We are of the opinion that that question does not arise on this record but if it does we cannot agree with the contention. The agreement to hold the securities as collateral, collect and distribute the proceeds was entered into by and between the appellant and Meyers and was approved by the stockholders. Meyers accepted the securities from the appellant company and executed the agreement on his part in this manner, to-wit: "I hereby acknowledge the receipt of the above described mortgages and agree to the terms of the above memorandum. D. S. Meyers, trustee." When Meyers accepted the

remained in the Sixth Class.

The errors assigned by the appellant on his appeal are: First, that the court erred in allowing the claim in the Sixth Class, when it should have been allowed as of the Fifth Class; Second, that the court erred in assessing costs to appellant; Third, that the judgment and order is contrary to the law and the evidence; and Fourth, that the court erred in not allowing the claim in the Fifth Class but allowed it in the Sixth Class.

There is no assignment of cross-errors shown by the

abstract. Appellate sets out in its brief and assignment of cross-errors which he says were assigned on the record but the record does not show any exceptions or objections to any ruling or judgment of the Circuit Court on which assignment of cross-errors could be based.

In this state of the record the question for determination in this court is, "Was the claim properly classified?" XXXXX If it was, the judgment against the appellant was proper. If it was not, then it should be given the proper classification and the costs should be taxed against the estate.

It is urged that the appellant has no claim but if there is a level of it it is in favor of the holders of the dividend notes and not in favor of the land company. The court of the opinion that that question does not arise on this record but it is does we cannot agree with the contention. The argument to hold the securities as collateral, collect and liquidate the proceeds was entered into by and between the appellant and lawyers and was approved by the stockholders. Lawyers accepted the securities from the appellant company and executed the agreement on his part in this manner, to-wit: "I hereby acknowledged the receipt of the above described mortgage and agree to the terms of the above memorandum. D. B. Meyers, trustee." When Meyers accepted the

securities from the appellant company and agreed to collect them and distribute the proceeds in the manner specified in the memorandum, we are of the opinion he would have been estopped from his obligation to account to the appellant company for such securities and the proceeds thereof, and appellee, his personal representative, is likewise estopped. The holders of the ~~xxx~~ dividend notes had no title to the securities nor to the proceeds before distribution. We are of the opinion that the appellant company is the proper claimant; that its claim was not contingent and the allowance of the claim was correct. We are further of the opinion that the deceased was a trustee in every sense of the word; that the trust was an expressed one; that it was an active trust; that he received this \$16,327.00 in trust for a specific purpose and failed to apply it to the purposes for which he received it.

The judgment of the Circuit Court in allowing the claim is affirmed; the order classifying it in the Sixth Class is reversed, and the cause is remanded to the Circuit Court of Livingston County with directions to allow the claim as of the Fifth Class.

Affirmed in part and reversed in part
with directions.

accounts from the appellant company and agreed to collect them and distribute the proceeds in the manner specified in the memorandum, we are of the opinion he would have been estopped from his obligation to account to the appellant company for such accounts and the proceeds thereof, and expenses, his personal representative, is likewise estopped. The holders of the said dividend notes had no title to the securities nor to the proceeds before distribution. We are of the opinion that the appellant company is the proper claimant; that its claim was not contingent and the allowance of the claim was correct. We are further of the opinion that the deceased was a trustee in every sense of the word; that the trust was an expressed one; that it was an active trust; that he received this \$18,507.00 in trust for a specific purpose and failed to apply it to the purposes for which he received it. The judgment of the Circuit Court in Alabama, the claim is affirmed; the order classifying it in the sixth class is reversed, and the cause is remanded to the Circuit Court of Davidson County with directions to allow the claim as of the Fifth Class.

Affirmed in part and reversed in part with directions.

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause. of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and thirty-_____

Clerk of the Appellate Court

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the second day of February, in the year of our Lord one thousand nine hundred and thirty-two, within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.

Hon. FRED G. WOLFE, Justice.

Hon. JAMES S. BALDWIN, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

265 I.A. 611⁵

BE IT REMEMBERED, that afterwards, to-wit: On

FEB 18 1932 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

In the Appellate Court of Illinois

Second District

October Term, A. D. 1931.

Thomas J. Ryan,

appellee,

vs.

Appeal from Circuit Court

Chauncey C. Landon, Operating

of Peoria County.

as Landon New System Dentist,

appellant

BALDWIN, J:

This case is brought to this court on appeal from the Circuit Court of Peoria County to obtain relief from a judgment of \$3000 entered there against appellant, hereinafter for convenience called defendant, and the cause arised from an alleged malpractice on the part of defendant while practicing dentistry in the City of Peoria. The appellee, hereinafter called plaintiff for convenience, filed his original declaration of five counts charging defendant personally extracted plaintiff's teeth and conducted himself so unskillfully that plaintiff's tongue was injured and became partially paralyzed.

A demurrer was sustained to that declaration. An amended declaration of ten counts was later filed, the first five of which alleged that defendant personally treated and extracted plaintiff's teeth so unskillfully, etc., that plaintiff's tongue became partially paralyzed.

After the trial had been in progress for more than a day the first five counts were dismissed and at the close of all of the evidence counsel withdrew the seventh count of the amended declaration so that the case was taken by the jury on the declaration consisting of four counts, namely, the 6th, 8th, 9th and 10th counts of the amended declaration, each of which charges that

In the case of the State of Illinois

vs. John Doe

October 10, 1911

Thomas J. Ryan

Attorney

State of Illinois

vs.

John Doe

Charles C. Ryan

Attorney

Attorney

Vol. 10, No. 1

This case is brought to you by the
 Circuit Court of Cook County to obtain relief from a judgment
 of \$30.00 entered there against the defendant, defendant the
 venues called defendant, and the cause arises from an alleged
 malpractice on the part of defendant while practicing dentistry
 in the City of Chicago. The defendant, defendant called plaintiff
 for convenience, filed his original petition of five counts
 charging defendant with various alleged malpractice, tort and
 negligence himself as maliciously and fraudulently
 injured and became seriously diseased.

A demurrer was returned to said petition. It is amended
 declaration of ten counts was filed, the first five of which
 alleged that defendant maliciously, fraudulently and negligently
 treated as maliciously, etc., that defendant's conduct became parti-
 cularly negligent.

After the trial was held in Chicago for more than a day
 the first five counts were withdrawn and at the close of all of
 the evidence received against the defendant counts of the amended
 declaration so that the case was taken to the jury on the last two
 also consisting of four counts, namely, the 6th, 7th, 8th and 9th.

the negligence specified was committed by an agent of servant of the defendant. The sixth count charges general negligence through unskillfullness in the extraction of teeth which caused partial paralysis of the tongue. The eighth charged a breaking of the upper teeth during extraction remaining in plaintiff's jaw causing embolism and paralysis. The ninth charges the breaking of plaintiff's teeth during extraction and negligently failing to properly cleanse and treat gums thereafter and an embolism resulting causing paralysis and the tenth charges paralysis due to unskillfull extraction and that the injury was increased later by failure of defendant's agent to send plaintiff to a physician.

The plea of the general issue was filed as was also a special plea denying that defendant through an agent, etc., extracted said teeth.

It appears that the defendant had been practicing dentistry in Peoria for 19 years prior to the time of the trial. He employed a lady attendant, cashier, two or three assistant dentists and a laboratory mechanic. At that time he had in his employ a Dr. A. A. Clinkenbeard, a licensed dentist in the state for more than 30 years, and a brother of defendant Orrin F. Landon, who worked in the laboratory, who was not a dentist and had never practiced, his work being confined to construction of dental plates and other processes of a mechanical nature. The plaintiff was a resident of Marshall County and was occupied as a farmer. He was 59 years old and all his upper teeth except seven, had been extracted prior to May 13, 1929. It appears that for some time before this date, the remaining teeth in his upper jaw had been hurting him and he decided to have them extracted. He went to Peoria for that purpose and the teeth were removed at the office of the defendant May 13, 1929. The operation was performed between the

the negligence specified was committed by an agent of defendant of the defendant. The sixth count charges general negligence. The negligence specified in the extraction of teeth which caused partial paralysis of the tongue. The eighth charge is a charging of the upper teeth during extraction resulting in plaintiff's jaw causing embolism and paralysis. The ninth charges the breaking of plaintiff's teeth during extraction and negligently failing to properly cleanse and treat oral cavity and an embolism resulting causing paralysis and the tenth charges plaintiff's due to negligently extraction and the injury was increased later by failure of defendant's agent to send plaintiff to a physician.

The plea of the general issue was filed as was also a special plea denying that defendant through its agent, etc., extracted said teeth.

It appears that the defendant had been practicing dentistry in Texas for 19 years prior to the date of the trial. It employed a lady stenographer, cashier, two dental assistants and a laboratory technician. It was in the city of Dallas, Texas. A licensed dentist in the state for more than 20 years, and a holder of a license in the state of Texas, who worked in the laboratory, who was not a dentist and had never practiced, his work being confined to construction of dental plates and other processes of a mechanical nature. The plaintiff was a resident of Dallas, Texas, and was employed as a stenographer. He was 50 years old and all his upper teeth were removed, and been replaced prior to May 10, 1934. It appears that for some time before this case, he resided with his wife and daughter in the city of Dallas and he desired to have them removed. He went to the dentist for that purpose and the teeth were removed in the office of the defendant on May 10, 1934. The operation was performed between the

hours of one and three P.M.

It is disputed as to who attended plaintiff for the extraction. Dr. Clinkenbeard and the lady attendant testified that he performed the extraction. Plaintiff claims that the teeth were extracted by Orrin Landon. Plaintiff states that when he got into the dentist chair he said that he wanted to have some upper teeth pulled and that the dentist made certain preparations therefor and extracted four on the right and three on the left of the upper jaw. Plaintiff claims that after the extraction the dentist said, "I have broken off two on the right and one on the left and you come back in two weeks and I will take them out." This is denied, however, by the operator. Certain directions were given to plaintiff about cleansing the mouth and to come back in two weeks. Plaintiff paid \$6.00 for the service and received a receipt therefor. An hour and a half later plaintiff states that his tongue was swollen stiff and sore and that his head hurt and jaw hurt and pained; his tongue was thick and he could not talk so his folks could know what he said. That condition lasted about a week and at times it would get better and at other times it was worse although at the trial he talked fairly well. Plaintiff states that he went back to the dentist's office in two weeks and that his mouth was examined; that they could not find any pieces of teeth and plaintiff asked about the reason for his not being able to talk and was told that he would be all right when he got a plate made. It appears that plaintiff took out four pieces of teeth from the places where the seven had been extracted, in September following. Plaintiff was treated by a dentist during July of 1929, when he was fitted with a plate in his upper jaw. At that time there was no appearance of roots or particles in plaintiff's gums and later in April of 1930 some additional pieces were eliminated from plaintiff's gums. However, that was after

plaintiff had gone to the dentist who fit him with the plate a second time, the first plate having become unsatisfactory on account of shrunken gums. The plaintiff had been treated by a chiropractor for lumbago as well as examinations by a physician during September, 1930 and by another physician in October, 1930, both of which examinations were more or less superficial and these physicians were not called as witnesses.

Plaintiff claims that he has had only partial use of his tongue in eating and talking and that when he attempts to eat he has great difficulty and ordinarily people cannot understand him when he attempts to converse; that he did not have this condition prior to the time of the extraction is evidenced by three witnesses who had known him for many years.

Plaintiff seeks to enforce liability on defendant by reason of unskillfulness in extracting the teeth and in not giving proper treatment at the time to allay unfavorable results or to direct plaintiff to see a physician after the tongue conditions became apparent and charges negligence through unskillfulness causing embolism and paralysis.

Plaintiff attempts to prove that embolism and partial paralysis resulted from the alleged unskillfulness, very largely if not wholly, through expert testimony offered on the trial, by means of hypothetical questions asked of the experts. He also attempted to prove unskillfulness or that reasonable care was not exercised in the performance of the extraction by means of expert testimony.

Many reasons are assigned for a reversal of the judgment among them being that the court erred in the admissibility of certain expert testimony offered on the part of the plaintiff;

plaintiff was told by the doctor that it was the first time
second time, the third time having been unsuccessful. The
doctor of course knew. The plaintiff had been treated by
a physician for years as well as examinations by a physician
during treatment, 1935 and by another physician in 1936, 1937,
1938 and 1939. Examinations were made of the plaintiff and were
plaintiff were not called as witnesses.

Plaintiff claims that he was not only treated but of his
doctor in 1935 and 1936 and that when he returned to his
home first difficulty and eventually having caused himself his
when he attempted to converse; that he did not have any condition
prior to the time of the extraction is evidenced by the statements
and had known him for many years.

Plaintiff seeks to enforce liability on defendant by
reason of unskillfulness in extracting the teeth and in not giving
proper treatment at the time to bring defendant's hands on to
direct plaintiff to see a physician after the teeth were extracted
became painful and caused him to suffer from unskillfulness
causing embolism and paralysis.

Plaintiff attempts to prove that embolism was caused
by the teeth and the alleged unskillfulness, very little
if not wholly, through expert testimony offered on the part of
some of hypothetical questions asked of the experts. He also
attempts to prove unskillfulness on the part of defendant by
not examining in the first place all the conditions of teeth or
expert testimony.

Plaintiff has retained for a number of the doctors
among them being that the court tried in the plaintiff's life
certain expert testimony offered in the case of the plaintiff;

that conduct of counsel for plaintiff during the trial and in the argument to the jury, was improper and that the court erred in giving certain instructions. From an examination of the record it is disclosed that the principal facts relied upon by plaintiff for recovery were in effect established, if at all, by expert testimony. In other words, it is contended that the record discloses that, after detailing of the facts by plaintiff and some other witnesses relative to the extraction, certain hypothetical questions were asked of two or three witnesses and answers were given by them, the questions and answers being based upon subjective symptoms, the experts not having treated the plaintiff but had only examined him some time after the extraction and before the trial and in order that this matter may more fully appear, it will be necessary to insert herein some of these questions and answers. A witness, Dr. W. W. Evans, who was 41 years of age and had practiced general dentistry since 1912, except the last year and because of illness he had closed his office, but intended to return to the practice, stated that he examined the plaintiff in January of 1930, looking at his mouth, and noticed the tongue; that he saw plaintiff's tongue stick out of his mouth part of the time when he examined him and drawn to the right side part of the time; that he examined him about two days before his testimony was offered and that there was no difference in his condition, and he was asked what in his opinion, was the condition of the tongue at the time he saw it on both occasions, which was objected to and the court directed him to answer the question upon objective symptoms. His answer was that there was a partial loss of function which he called ^{partial} paralysis and the defendant made a motion to strike which was overruled. Then this ~~questi~~ witness was asked a hypothetical question which was the same question asked practically all other witnesses and it will be set out therefore in extensio, and it is as follows:-

...of counsel for plaintiff during the trial was to the
...to the jury, as proposed and that the court ruled in
...giving certain instructions. From an examination of the record
it is disclosed that the principal facts relied upon by plaintiff
for recovery were in effect established, in fact, by expert
testimony. In other words, it is contended that the record dis-
closes that, after a full and complete examination of the facts by the jury and some
other witnesses relative to the extraction, certain hypothetical
questions were asked of two or three witnesses and answers were
given by them, the questions and answers being based upon an ob-
jective situation, the experts not having treated the plaintiff
but had only explained his case after the extraction had been
given the trial and in order that this matter may more fully ap-
pear, it will be necessary to insert herein some of these questions
and answers. A witness, Dr. W. J. Evans, who was of legal age
and had practiced general dentistry since 1911, except the last
year and because of illness he had the whole office, had intended
to return to the practice, stated that he examined the plaintiff
in January of 1930, looking at his teeth, and noticed the fracture;
that he saw plaintiff's fracture which one of his assistants part of the
time when he examined him and drew to the right side part of the
time; that he examined him about two days before his testimony was
offered and that there was no difference in his condition, and he
was asked what in his opinion, was the condition of the fracture at
the time he saw it in both positions, which was objected to and
the court directed him to answer the question upon objective conditions.
His answer was that there was a partial loss of function which he
called "paralysis" and the defendant made a motion to strike which
was overruled. Then this expert witness was asked a hypothetical
question which was the same question asked previously. All other
witnesses and it will be set out therefore in evidence, and it is
as follows:-

"Q. Now, doctor, assume that plaintiff, Thomas J. Ryan, went to the office of Chauncey C. Landon, the defendant, on the 13th day of May, 1929, about 11 or 11:30 in the morning; that he was 59 years of age and in good health, and had never had paralysis or paralysis of the tongue, and that at said time the defendant examined the mouth of the plaintiff and told him that seven of his upper teeth should be pulled, these teeth being the upper right center and the three next to it on the right and the three to the left of where the upper left center would have been had it been in his mouth, but which had already been pulled; and further assume that the defendant then and there told the plaintiff to return at 1 o'clock, and the plaintiff did return at that time, and the defendant then directed his employe or agent to pull the teeth referred to; and further assume that this employe or agent injected an anesthetic with a dental syringe in the gums surrounding said teeth, and that he next injected the anesthetic in the top of the mouth, or hard palate; that he waited ten or fifteen minutes, and got his forceps and started to pull, beginning on the tooth farthest to the right; and assume after he started to pull these teeth that he rested a short interval between each tooth and didn't finish until 3 o'clock; further assume that these teeth in question were heavy, strong teeth, and assume further that the roots of the first three teeth pulled broke off and that the root on one of the teeth to the left of the two center teeth broke off; assume further that the employe or agent of the defendant, after the extraction, stated to the plaintiff that he had broken off two on the right side and one on the left, and told the plaintiff that it would not be necessary for him to return for examination or treatment for two weeks. Assume further that the employe or agent or servant of the defendant did not advise any treatment other than the washing out of the mouth with

of the teeth, having the plaintiff, and J. L. Ryan, went to the office of William J. O'Brien, the defendant, on the 13th day of May, 1937, about 11 or 11:30 in the morning; that he was 25 years of age and in good health, and had never had pain in or swelling of the tongue, and that he said that the defendant examined the roots of the plaintiff and told him that seven of his upper teeth should be pulled, those teeth being the upper right center and the two next to it on the right and the three to the left of where the upper left center would have been had it been in his mouth, but which had been pulled; and further stating that the defendant then and there told the plaintiff to return at 1 o'clock, and the plaintiff did return at that time, and the defendant then directed his employe or agent to pull the teeth referred to; and further stating that this employe or agent injected an anesthetic with a dental syringe in the gum around the teeth, and that he next injected the anesthetic in the top of the mouth, on each side; and he waited ten or fifteen minutes, and got his hands and started to pull, beginning on the lower left-hand side to the right; and some time after he started to pull these teeth that he started a short interval between each tooth and didn't think until 8 o'clock; further stating that these teeth in question were heavy, strong teeth, and as he finished that the roots of the three teeth which broke off and sent the root on one of the teeth to the left of the two center teeth broke off; and when further that the employe or agent of the defendant, after the extraction, stated to the plaintiff that he had broken off two on the right side and one on the left, and told the plaintiff that it would not be necessary for him to return for examination or treatment for two weeks. He further told the employe or agent of the defendant and that advice and treatment when the swelling out of the mouth with

salty water. Assume further that the plaintiff left the office of the defendant, and between Peoria and Chillicothe, at about 4 o'clock that same afternoon, he had difficulty in speaking and in the use of his tongue. Assume further that there was swelling at that time in the lips and cheeks of the plaintiff and the gums, and that the plaintiff could not control his tongue in speaking. Assume further that the plaintiff arrived at his home about 5:30 that afternoon, and at that time the jaws and gums were sore and badly swelled; that during the night he suffered much pain, and the next morning his jaws and upper lip and cheeks were badly swelled and discolored under the eyes and his lip bloodshot, and that the tongue was thick, and that plaintiff couldn't use it in forming his words or in talking; that the jaws and cheeks were sore and stiff and beat and throbbed. Assume further that at the end of two weeks the plaintiff again came to the defendant's office and that the defendant, by himself or his agent, examined the plaintiff and his upper jaw and said, "I must have been mistaken. There is nothing there," and said there was nothing to do about it, and at said time the plaintiff asked the employe or agent of the defendant what was the reason he couldn't talk and he said, "That is nothing. You will be all right when you get your plate." And assume further that later four pieces of roots were removed from the right side of the upper jaw and two roots were removed from the left side, being the roots of these teeth attempted to be extracted. That there is still one left on the left side. Doctor, assuming those facts, have you an opinion as to whether or not the servant or employe of the defendant had used reasonable skill, such as members of the dental profession in good practice in this vicinity ordinarily use in such cases?" This question was objected to by the defendant and the court allowed the witness to answer and the witness answered that he had an opinion and upon being asked what that opinion was his answer was, "that he did not." Later this same

...the defendant, and between himself and the witness, at about 4
o'clock, and at 4:30, he had difficulty in speaking and
in the use of the tongue. ... at that time in the lips and corners of the mouth and the corners
and that the plaintiff could not control his tongue in speaking.
... the plaintiff stated at his home about 5:30
that afternoon, and at that time the pain and numbness were more
badly swelled; that during the night he suffered much pain, and
the next morning his jaws and upper lip and a sore very badly
swelled and discolored under the tongue his lip bloodshot, and
that the tongue was thick, and that plaintiff couldn't use it
in turning his words or in talking; that the jaws and cheeks were
sore and stiff and numb and swollen. ... at the
end of two weeks the plaintiff came to the defendant's office
and that the defendant, by himself or his agent, examined the plaintiff
and his upper jaw and said, "I must have seen this man. There
is nothing there," and said there was nothing to be done for it, and
at that time the plaintiff asked the plaintiff's agent of the defendant
and what was the reason he couldn't talk and he said, "That is
nothing. You will be all right when you get your plate," and
... the right side of the upper jaw and the roots were removed from
the left side, being the roots of these teeth attempted to be
extracted. That there is still one left on the left side. ...
... have you an opinion as to whether or not the
... of the defendant had used reasonable skill, care
... of the dental profession is good practice in this locality
... use in such cases? This question was objected to by
the defendant and the court allowed the witness to answer and the
witness answered that he had an opinion and when being asked what
that opinion was the answer was, "That he did not." After this time

witness was asked another hypothetical question as previously given with the following interrogatory;- "Dr. assuming those facts which have been stated, and further assumed that this tongue became paralyzed or partially paralyzed as stated before, could that injury have resulted from the attempted extraction of these teeth as above stated?" This question was objected to and the court allowed the witness to answer which was that "it could."

On cross-examination it developed that when he first examined plaintiff in January 1930, plaintiff's wife was with him and when they came into the office witness was informed there was something the matter with his tongue. Witness conversed mostly with the wife as he could not understand plaintiff and the wife told witness about the plaintiff. Witness made an examination of him by looking into his mouth, watched him talk and watched the movements of his mouth and tongue when he talked. After talking with the wife he put plaintiff in a chair with his mouth open and looked in. After he got through looking in his mouth he conversed with him and his wife. He did nothing else and his recollection was clear as to what happened. "Q. It was as a result of your conversation with Mrs. Ryan, his wife, as a result of looking into his mouth when you held his mouth open and as a result of your conversation with him that you decided that he had a partial paralysis of the tongue; is that right:

A. That is not all that decided me.

Q. What else did you include?

A. I formed a conclusion and I added what experience I had had in school and in my practice after I had left school.

Q. But, so far as your ~~actual~~ conduct in the office that day, your conversation with Mrs. Ryan, your looking into the patient's mouth and your conversation with him, was all that you actually did there; is that true or not?

A. I saw his tongue.

Witness was asked another hypothetical question as previously stated with the following question: "If the witness had been present at the time the witness was asked the question, would the witness have been able to identify the person who was driving the vehicle?"

not through looking in his room in conversation with him and his wife. Plaintiff on a chair with his mouth open and showed him. After he mouth and tongue when he talked. After talking with the wife he put into his mouth, showed him and showed him conversation of his about the Plaintiff. Witness made no observation of his by looking with as he could not understand Plaintiff and the wife said witness being the matter with his tongue. Witness conversed freely with Plaintiff when they came into the office and was observed there and was- Plaintiff is 1200, Plaintiff with her with him and- - -

[illegible]

That is not all that occurred.

... that else old or ...

At the end of the day, I had a very good dinner.

school and in the village. After a few days...

and your conversation with him, was all part of what he did there; conversation with him, you indicate here the defendant's motive

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I B W N I .

Q. I presume you did when you looked into his mouth, but did you do anything else in that examination?

A. No.

Q. Did you at that time conclude that he a partially paralyzed tongue?

A. Loss of control is partial paralysis.

Q. ~~Then~~ you did conclude that he had a partially paralyzed tongue at that time, did you?

A. Yes, sir.

Q. You applied your knowledge to these facts and reached that conclusion?

A. Yes, sir.

Q. Now, you depended somewhat on what Mrs. Ryan told you about the man, did you not?

A. Yes.

Q. And you depended somewhat on what Mr. Ryan told you about himself, did you not, for your conclusion?

A. Yes.

Q. In any event, doctor, your conclusion as to partial paralysis was based, at least partially, upon subjective symptoms, wasn't it?

A. Yes, sir.

Q. The man came to you that day for an examination, did he not?

A. Yes, sir. At that time I did not know he had a lawsuit. I did not treat him that day, and at no time was I ^{the} treating doctor." Later, on re-direct and re-cross examination, he stated his opinion was formed on what he saw when he looked at plaintiff and examined his mouth and what he had been told and if he had testified otherwise on direct examination he did not understand the question. This same procedure was substantially used with the examination of other witnesses called for the plaintiff, namely; Dr. Henry Wilson who was a physician and surgeon who examined plaintiff in May, 1930, by giving him a general examination and examining his tongue, mouth and throat. He stated the man had a partial paralysis

Q. I presume you did not look into his case, did you?

A. Yes, sir.

Q. Did you?

A. Yes, sir.

Q. Did you?

A. Yes, sir.

Q. Did you?

A. Yes, sir.

Q. Did you?

A. Yes, sir.

Q. Did you?

A. Yes, sir.

Q. Did you?

A. Yes, sir.

Q. Did you?

A. Yes, sir.

Q. Did you?

A. Yes, sir.

Q. Did you?

A. Yes, sir.

Q. Did you?

A. Yes, sir.

Q. Did you?

A. Yes, sir.

Q. Did you?

A. Yes, sir.

Q. Did you?

A. Yes, sir.

Q. Did you?

A. Yes, sir.

Q. Did you?

A. Yes, sir.

Q. Did you?

of the tongue and that his condition was a permanent one. He had never treated the plaintiff; that plaintiff came to his office and talked to him and he noticed the difficulty with his speech; looked in his mouth and saw his tongue and saw it move and after looking in the mouth he talked to him further. He did not use neuro logical instruments in making the test. He concluded the plaintiff had a partial paralysis of the tongue from his conervation with him and looked into his mouth and taking hold of his tongue with his fingers and from conversations with him afterwards. The witness also stated that the symptoms of plaintiff's inability to talk and use his tongue as indicated from the conversations are what ordinarily would be accepted as subjective symptoms and that when he made some of the examinations he knew that suit had been brought.

Dr. Joel Eastman, another witness called for plaintiff stated that he examined plaintiff and that he determined that there was partial paralysis of the muscles of the tongue and his testimony was based upon what he called objective symptoms. He observed the actions of the muscles of the face and tongue when he talked and sat quiet; that he was unable to swallow naturally and that involuntary movements had to do with the control of the muscles of the face. He was then asked the hypothetical question heretofore referred to, as the other witnesses had, and was permitted to answer. Dr. Jacob F. Cart, another expert called on behalf of plaintiff and after detailing his conversations, was asked the hypothetical question with reference to whether or not the defendant had used reasonable skill and he answered that he had an opinion and that in his opinion defendant did not use reasonable skill in the performance of the extraction.

It seems to us that the foregoing questions and extracts from the record and the testimony of the plaintiff, substantially represents what is complained of by the defendant.

It will be observed that included in the factors that were taken into account in giving answers to these questions with reference to the alleged causal effect of the extraction, witnesses took

into account symptoms which are subjective and not objective. The expert witnesses talked to the plaintiff and to plaintiff's wife in some instances, and in order to observe the movements of the jaw and tongue, no doubt it was necessary to ask the plaintiff questions and to give certain directions which were followed by him in order for the action of the muscles of the face and of the tongue to be observed by the witnesses, and were demonstrated to the witnesses at the time the witnesses were making an examination of the plaintiff, presumably for the purpose of testifying later in a law suit involving the identical subject, and at least a part of these symptoms were shown here by word of mouth or by some other physical manifestation which was as self-serving as a history of the case would be after given by plaintiff to the witnesses.

It is clear to us that subject^{ive} symptoms were used by these experts upon which to base their answers to the hypothetical questions.

This court has held in *Thomas v. Illinois Power & Light Corp.*, 247 Ill. App. 378, as follows:- "The rule is, as we understand it, that the opinion of a physician who has not treated the injured party but has made an examination shortly before the trial for the purpose of testifying as a witness, when based partially upon subjective and partially upon objective symptoms, is not admissible." *Grainke v. Chicago City Ry. Co.*, 234 Ill. 564; *Shaughnessy v. Holt*, 236 Ill. 485; *Wells Bros. Co. v. Industrial Commission*, 306 Ill. 191.

In accordance with the rule as we have previously found it, we do here again reiterate it as being based upon the great weight of authority in this state, the court erred in allowing these witnesses to answer these hypothetical questions and again erred in declining to strike the answers upon proper motion after their cross-examination, when it clearly appeared, if not before,

into account systems which are not justified and not of justice.
The expert witnesses called to the trial and to the jury
with in some instances, and in others to correct the movements
of the law and justice, and in others to correct the movements
with questions and to give certain directions to the jury and to
by him in order for the jury to be able to understand the facts of
the case and to be able to understand the facts of the case and to
to the jury and to the jury and to the jury and to the jury and to
tion of the plaintiff, presumably for the purpose of establishing
later in a law suit involving the plaintiff's estate, and at least
a part of these questions were asked by the jury and by the
some other questions which were asked by the jury and by the
history of the case would be given by the plaintiff to the jury
respects.

It is clear to us that the questions were asked by
these experts upon which to base their answers to the hypothetical
questions.

This court has held in the case of *Miller v. Miller*, 201 Ill.
Corp., 201 Ill. App. 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

In accordance with the rule as we have previously found
it, we do not wish to reiterate it as set forth upon the facts
weight of authority in this state, and court cases in allowing
that witness to answer these hypothetical questions and answer
error in deciding to allow the answers upon proper facts after
their own examination, when it clearly appears, as it now appears,

that they took into consideration improper factors under the circumstances in venturing an opinion to the hypothetical question.

In this record appears the objection to the other question which asks the witnesses directly to give an opinion as to whether or not the servant or employe of the defendant had used reasonable skill such as members of the dental profession in the City of Peoria usually used. We are of the opinion that to allow witnesses to answer this question was reversible error for the reason that it permitted these witnesses to testify to an ultimate fact and thus invade the province of the jury. By referring to the declaration it will be seen that the plaintiff is charging the defendant with negligence in that he unskillfully extracted his teeth causing partial paralysis, etc.

It therefore became an essential part of plaintiff's proof to show facts which would demonstrate by a preponderance of the evidence that the treatment accorded plaintiff by defendant was negligent in that it was not reasonably skillful, for one who holds himself out as a practicing dentist is only required by law to exercise the degree of care and skillfulness towards his patients such as other members of the dental profession in good practice in the vicinity ordinarily use in other similar cases. It therefore became a question of fact in this case in order for plaintiff to substantiate this phase of his case, to meet that proof. A similar question to this arose in Keefe v. Armour & Co., 258 Ill. 28, where one of the questions was whether the method which the defendant's foreman directed the plaintiff to use in testing a tank car for leaks, was reasonably safe. The court in that case held that it was proper to permit the plaintiff to prove by properly qualified experts what conditions might arise from the use of such method with reference to gases, heat, etc., but that it was error to allow an expert witness to state that in his opinion the method employed was unsafe, the court saying: "To permit the witness to give his

that they took into account the fact that the witness was a
competent in continuing to speak in the hypothetical question.

In this second question the objection to the other question
which was the witness' ability to give an opinion as to whether
or not the witness on either of the defendant had used reasonable
skill may be considered as the direct question in the first of
these usually asked. We are all well known that in cases of witness
to answer this question was necessary to state the reason why it
permitted some witnesses to testify in an opinion that was not
invade the province of the jury. In relation to the defendant
it will be seen that the objection is changed in the second
negligence in that he is continuing extended his reason giving
partial paralysis, etc.

It is possible to have an extended part of the witness' proof
to show that the witness would be competent to give an opinion in the
evidence that the defendant's extended ability to testify was
negligence in that it was not reasonably skillful, but was not
himself and as a witness' ability is only required of him to ex-
ercise the degree of care and skillfulness towards his witness
and as a direct question of the direct question in the first
the witness' ordinarily, but in other cases. It therefore
became a question of why the witness was in such a position to
understand this question of the case, to what it is that
question as to what was in issue in the case, the witness' ability
one of the questions was whether the witness was competent
to answer the question as to what was in issue in the case and the
issue, and reasonably well. The court in the case of the witness
was proper to refuse to allow the witness to testify in an opinion
experts that conditions which were not of such nature
with reference to the witness' ability, but that it was proper to allow
an expert witness to state that in his opinion the witness employed
was negligent, the court saying: "The question was whether or not the

opinion on the ultimate fact was to supplant the jury by a witness, and practically take from the defendant the right to a judgment of the jury as to the proper inferences to be drawn from the facts. Of course, the jury was entitled to the aid of experts in determining the existence or non-existence of facts not within the common knowledge from which a conclusion would arise whether the method was reasonably safe. It was competent to prove that the conditions stated in the hypothetical question would be liable to form gases; that such gases would be explosive and would explode by ignition or at a certain temperature, as well as any other fact which would enable the jury to draw an inference as to the ultimate fact to be determined, but it is the rule of this court that an expert witness must not take the place of the jury and declare his belief as to the ultimate fact."

To the same effect upon a similar question, see *Interstate Finance Corporation v. The Commercial Jewelry Company*, 230 Ill. 116.

It is also alleged that the court erred in giving certain instructions on the part of the plaintiff. It is insisted that the 3rd, 4th and 5th instructions were erroneous; that these instructions given at the request of plaintiff advised the jury of the 6th, 8th and 9th counts of the declaration; also that if the evidence showed certain facts, the defendant was liable and a finding should be in favor of the plaintiff.

An instruction that submits it to the jury to find if a certain fact exists, virtually tells them that there is evidence tending to prove such fact and if there is no evidence tending to prove such fact, the instruction is calculated to mislead the jury and is erroneous. *Devine v. Chicago Railways Co.*, 189 Ill. App. 435; *Kaufman v. Helmick*, 212 Ill. App. 10; *H. W. Faulkner & Co. v. Centralia Bottling Works*, 234 Ill. App. 9, (p. 13).

opinion on the ultimate fact was so important as to require the testimony of a witness, and practically, take from the defendant the right to a verdict of acquittal. The jury as to the proper inference to be drawn from the facts. Of course, the jury was entitled to the aid of experts in determining the existence or non-existence of facts and within the common knowledge of which a commission would state whether the matter was reasonably true. It was suggested to prove that the conditions stated in the hypothetical question would be likely to form a basis; that such facts would be conclusive and would exclude a finding of fact at a certain temperature, as well as any other fact which would exclude the jury to draw a conclusion as to the ultimate fact to be determined, but it is the rule of this court that an expert witness must not take the place of the jury and decide the matter as to the ultimate fact."

To the same effect upon a similar question, see Interstate Finance Corporation v. The Commercial Travelling Agency, 230

Ill. 116.

It is also stated that the court erred in giving certain instructions on the part of the plaintiff. It is insisted that the 3rd, 4th and 5th instructions were erroneous; that these instructions given at the request of plaintiff favored the fact of the 5th, 6th and 7th counts of the declaration; also that if the evidence showed certain facts, the defendant was liable and a finding should be in favor of the plaintiff.

An instruction that amounts to no more than to find it a certain fact exists, virtually tells them that there is evidence tending to prove such fact and if there is no evidence tending to prove such fact, the instruction is entitled to weight, the jury and is erroneous. See v. Illinois Central Ry. Co., 128 Ill. 405; 435; Southern v. Southern, 112 Ill. 405, 406; v. Southern v. Southern, 112 Ill. 405, 406; v. Southern v. Southern, 112 Ill. 405, 406; v. Southern v. Southern, 112 Ill. 405, 406.

In view of the rule announced in these cases, said instructions 3, 4 and 5 were erroneous and calculated to mislead the jury. It will be observed that the 4th instruction informs the jury that if the evidence showed that by and through the dentist's lack of skill, parts of plaintiff's teeth became broken and blood clotted therein which caused an embolism, they should find for the plaintiff. As a matter of fact, in view of the whole record we are of the opinion that there is no testimony that the plaintiff's teeth were broken during the extraction or that they were permitted to remain in his jaw.

Complaint is also made in this record as to the conduct of counsel for plaintiff in constantly referring to one of the witnesses for defendant as a "hairlip" and also the alleged dramatic incident during the trial with the witness Darnell, all of which was reprehensible and no doubt, on proper application of counsel to the court, would have been rebuked.

For the errors which we have found in this record we therefore hold that the action of the lower court be reversed and that the cause be remanded for a new trial.

Reversed and Remanded.

On view of the facts presented in these cases, and
testimony of a well known physician who testified to his
last the fact. It will be observed that the fact of
injury was not in the evidence. Hence that by and
through the plaintiff's lack of skill, want of judgment
feels some reason and which related to the fact of
an accident, but should not be for the plaintiff. As a matter
of fact, in view of the facts stated we are of the opinion
that there is no testimony that the plaintiff's teeth were
broken during the extraction or that they were injured to
remain in the jaw.

Plaintiff is also liable in this respect as to the conduct
of counsel for plaintiff in repeatedly referring to one of the
witnesses as a defendant as "plaintiff" and also the alleged
dramatic incident during the trial with the witness "witness",
all of which was reprehensible and no doubt, in proper objection
of counsel to the court, would have been reversed.
For the error which we are found in it is found we
therefore hold that the action of the lower court be reversed
and that the case be remanded for a new trial.
Reversed and remanded.

STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and thirty-_____

Clerk of the Appellate Court

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the second day of February, in the year of our Lord one thousand nine hundred and thirty-two, within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.

Hon. FRED G. WOLFE, Justice.

Hon. JAMES S. BALDWIN, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

265 I.A. 612

BE IT REMEMBERED, that afterwards, to-wit: On

FEB 1 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

In the Appellate Court of Illinois

Second District

October Term, A. D. 1931

The People of the State
of Illinois,

Defendant in error

vs.

Error to County Court of
Knox County.

Charles Spesia,

Plaintiff in error

Baldwin, J:

The State's Attorney of Knox County filed an information in the County Court of Knox County charging the defendant and others with a violation of the Illinois Prohibition Act. The defendant was the only one that was tried in the hearing of this case.

The facts disclosed by the record are that defendant and his companions were in an automobile wreck near Knoxville, Knox County, Illinois, and that they were riding in a Rickenbacher car, the cushions of the rear seat had been removed and a platform of boards was erected therein where the cushions should have been. Immediately after the accident defendant and his companions were seen rolling five kegs out of the car into a ditch where there were weeds. Immediately after rolling the kegs into the ditch defendant requested one Roy Wright to haul "this stuff" to Galesburg for him, but Wright refused to do it. Wright drove to Galesburg and notified the Sheriff, who immediately went to the scene of the accident and on looking around found the kegs in the weeds further down a short distance north of the car. One of the kegs was opened, the contents of it were seen and tasted by the Sheriff,

In the Appellate Court of Illinois

Second District

October Term, A. D. 1931

The People of the State

of Illinois,

Defendant in error

Error to County Court of

as

Knox County.

Charles Speas,

Plaintiff in error

vs.

The State's Attorney of Knox County filed an information

in the County Court of Knox County charging the defendant and

others with a violation of the Illinois Prohibition Act. The

defendant was the only one that was tried in the hearing of this

case.

The facts disclosed by the record are that defendant

and his companions were in an automobile wreck near Knoxville,

Knox County, Illinois, and that they were riding in a Stinson

car, the cushions of the rear seat had been removed and a flat-

board of boards was erected therein where the cushions should have

been. Immediately after the accident defendant and his companions

were seen rolling five kegs out of the car into a ditch where there

were weeds. Immediately after rolling the kegs into the ditch

defendant requested one Roy Wright to haul "this stuff" to Galasburg

for him, but Wright refused to do it. Wright drove to Galasburg

and notified the sheriff, who immediately went to the scene of the

accident and on looking around found the kegs in the weeds further

down a short distance north of the car. One of the kegs was

opened, the contents of it were seen and tested by the sheriff,

who later testified the five kegs contained beer. Defendant was arrested and taken to the county jail by a deputy named Classen. Classen also tasted the contents of the kegs and said they contained beer. Defendant was found guilty and sentenced to pay a fine and imprisonment at the state farm at Vandalia, from which judgment the case comes to this court on writ of error.

It is the contention of plaintiff in error that the evidence does not support the verdict in that there is no positive proof that the kegs contained intoxicating liquor, also that there is no positive proof that he was ever in possession of the kegs.

The Sheriff and his deputy each testified that they used to drink liquor before the 18th Amendment and could tell intoxicating liquor by the taste and that this was intoxicating liquor. There was also testimony that a sample of this liquor so found in the kegs taken by the Sheriff at the scene of the accident was examined by a Mr. Bower, a pharmacist, who is skilled in the testing of liquor, and who said after testing it by the government test that it contained 4% alcohol by volume and was fit for beverage purposes.

In the face of this evidence there is no doubt but that the liquor was intoxicating liquor contrary to law.

An examination of the record discloses that perhaps there is no positive evidence that these kegs that were found by the Sheriff were the same kegs that Wright saw defendant taking out of the car and rolling over into the ditch, but taking into consideration the fact that there was no cushion in the back seat of the car used by defendant and that the place where the cushions usually are was covered with boards, that Wright saw defendant rolling five kegs out of there into a ditch a

who later testified the five kegs contained beer. Defendant was arrested and taken to the county jail by a deputy named Klassen. Klassen also tested the contents of the kegs and said they contained beer. Defendant was found guilty and sentenced to pay a fine and imprisonment at the state farm at Vandalia, from which judgment the case comes to this court on writ of error.

It is the contention of plaintiff in error that the evidence does not support the verdict in that there is no positive proof that the kegs contained intoxicating liquor, also that there is no positive proof that he was even in possession of the kegs.

The sheriff and his deputy each testified that they used to drink liquor before the 18th Amendment and could tell intoxicating liquor by the taste and that this was intoxicating liquor. There was also testimony that a sample of this liquor was found in the kegs taken by the sheriff at the scene of the accident was examined by a Mr. Power, a pharmacist, who is skilled in the testing of liquor, and who said after testing it by the government test that it contained 45 alcohol by volume and was fit for beverage purposes.

In the face of this evidence there is no doubt but that the liquor was intoxicating liquor contrary to law. An examination of the record discloses that perhaps there is no positive evidence that these kegs that were found by the sheriff were the same kegs that Wright saw defendant taking out of the car and rolling over into the ditch, but taking into consideration the fact that there was no question in the past part of the car used by defendant and that the place where the kegs usually are was covered with boards, that Wright saw defendant rolling five kegs out of there into a ditch a

short distance from where the car was and the Sheriff found them at that point, or near it, it cannot be said with compelling force that a verdict of twelve men who heard the evidence, saw the witnesses and were cognizant of the circumstances portrayed upon the trial could help but believe beyond a reasonable doubt that they were the same kegs that Wright saw defendant take out of the automobile.

Defendant did not go upon the witness stand, nor was there any evidence offered in his behalf. At the close of the state's evidence defendant asked for an instructed verdict, which was denied, and then defendant rested and again renewed his motion for an instructed verdict.

We are of the opinion that a jury under this state of the proof could not have found otherwise than they did.

Instruction No. 15, which instructs the jury relative to prima facie evidence, is objected to by defendant as being reversible error. The cases cited by defendant are ones that apply when the defendant puts in evidence in defense denying or explaining the acts charged or alleged and then it is a question of fact for the jury to decide, but where the defendant offers no evidence and the facts are not controverted such an instruction is held good. *People vs. Tate*, 316 Ill. 52.

Defendant also claims that it was error for the court to sentence him when there was no proof in the record offered by the State as to the negative part of the information, to-wit: "Without having a permit from the Attorney General of the State of Illinois, etc." Upon this question our attention is called to the case of the *People vs. DeGeovanni*, 326 Ill. at page 239, where the court said:

"It is further contended by the defendant that the burden of proof was upon the People to prove the negative averment in the information that the defendant did not have a permit from the Attorney General.

short distance from where the car was and the Sheriff found them at that point, or near it, at least by this compelling force that a verdict of twelve men who heard the evidence, saw the witnesses and were cognizant of the circumstances portrayed upon the trial could help but believe beyond a reasonable doubt that they were the same kept that trial and defendant take out of the automobile.

Defendant did not go upon the witness stand, nor was there any evidence offered in his behalf. At the close of the state's evidence defendant asked for an instructed verdict, which was denied, and then defendant rested and again renewed his motion for an instructed verdict.

We are of the opinion that a jury under this state of the proof could not have found otherwise than they did. Instruction No. 15, which instructs the jury relative to prima facie evidence, is objected to by defendant as being reversible error. The cases cited by defendant are ones that apply when the defendant puts in evidence in his own defense or explaining the acts charged or alleged and then it is a question of fact for the jury to decide, not where the defendant offers no evidence and the facts are not controverted such as instruction in *People v. Tate*, 330 Ill. 32. Defendant also claims that it was error for the court to sentence him when there was no proof in the record offered by the state as to the negative part of the information, to-wit: "without having a point from the Attorney General in the state of Illinois, etc." Upon this question our attention is called to the case of *People v. DeGroot*, 330 Ill. at page 339, where the court said:

"It is further contended by the defendant that the burden of proof was upon the people to prove the negative averment in the information that the defendant did not have a permit from the Attorney General."

The law has been decided by this court contrary to this contention in the case of People v. Hollenbeck, 322 Ill. 443, and no further discussion of this question is necessary."

All questions raised in this record by the defendant having been answered adversely by this Court in this opinion it is ordered that the action of the court below be and the same is hereby approved.

Affirmed.

The law has been decided by this court contrary to
the contention in the case of *Teague v. Hollenbeck*,
332 Ill. 448, and no further discussion of this
question is necessary."

All questions raised in this record by the defendant
having been answered adversely by this court in this opinion
it is ordered that the action of the court before be and the
case is hereby approved.

Affirmed.

STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause. of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and thirty-_____

Clerk of the Appellate Court

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the second day of February, in the year of our Lord one thousand nine hundred and thirty-two, within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.

Hon. FRED G. WOLFE, Justice.

Hon. JAMES S. BALDWIN, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

265 I.A. 612²

BE IT REMEMBERED, that afterwards, to-wit: On

FEB 18 1932 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Second National Bank of

Freeport, Illinois,

appellant

vs.

Appeal from Circuit Court of

Stephenson County

E. L. Griffith, et al,

appellees

BALDWIN, J:

This suit was brought by the Second National Bank of Freeport, Illinois, appellant, in the circuit court of Stephenson County against E. L. Griffith and others, appellees, to recover upon a written instrument. The written instrument declared upon is in the words and figures as follows:

"Law offices of Elwyn R. Shaw

Freeport, Ill., February 10, 1925

\$1,500.00

This is to certify that the undersigned Alexander H. Steenrod, Receiver of L. M. Gross Company, is justly indebted to Second National Bank of Freeport, Ill. or order, in the principal sum of Fifteen Hundred Dollars, for borrowed money, due on demand, with interest at the rate of six per cent. per annum after date until paid. This certificate is issued pursuant to authority of the Circuit Court of Stephenson County, Illinois, and its repayment on an equality with another certificate for \$1,000.00 is to be a prior lien upon all of the assets in the hands of the undersigned receiver.

A. H. Steenrod

Receiver of L. M. Gross Company

Arthur A. Haas
F. Bache Van Nuys
H. C. Bilger
W. J. Rideout
K. H. Knowlton
A. J. Clarity
A. C. Knorr
E. L. Griffith
J. Wagner "

Second National Bank of

Freeport, Illinois

Defendant

Against First Circuit Court of

Stephenson County

E. L. Griffith, et al,

Plaintiffs

BALDWIN, J.

This suit was brought by the Second National Bank of Freeport, Illinois, plaintiff, in the circuit court of Stephenson County against E. L. Griffith and others, defendants, to recover upon a written instrument. The written instrument declared upon is in the words and figures as follows:

"Law offices of Allyn H. Shaw
Freeport, Ill., February 10, 1915

\$1,500.00

This is to certify that the undersigned Alexander H. Stearns, Receiver of U. M. Gross Company, is justly indebted to Second National Bank of Freeport, Ill. or order, in the principal sum of fifteen hundred dollars, for borrowed money, the on bearing, with interest at the rate of six per cent. per annum after date until paid. This certificate is issued pursuant to authority of the Circuit Court of Stephenson County, Illinois, and its return- ment on an equality with another certificate for \$1,000.00 is to be a prior lien upon all of the assets in the hands of the undersigned receiver.

A. H. Stearns

Receiver of U. M. Gross Company

Arthur A. Hall
T. Deane Van Wert
H. G. Elder
E. J. Blount
R. E. Knowlton
A. J. Gentry
A. C. Koon
E. L. Griffith
J. Warner

It appears that there was no entry of appearance of any defendants in the suit except the defendant, K. H. Knowlton. He filed a demurrer to the declaration and the demurrer was overruled. Knowlton then pleaded the general issue and special matters of defense. The special matters of defense pleaded were: First, that the alleged obligation sued on in this case was declared null and void by the Supreme Court of Illinois, in case of Alexander H. Steenrod, Receiver v. The L. M. Gross Company, et al, 334 Ill. 362; Second, suit was not begun against the principal debtor and only obligor in said instrument sued upon and all sureties and guarantors are thereby released from all liability thereunder; Third, that said written instrument does not show any obligation on the part of defendant, K. H. Knowlton, to pay any sum of money to plaintiff; Fourth, that the only obligor in said instrument sued upon is Alexander H. Steenrod, Receiver of the L. M. Gross Company; Fifth, that said Knowlton is released by the said decision of the Supreme Court and that all sureties and guarantors are likewise released from liability.

The record discloses that appellant, the Second National Bank of Freeport, Illinois, demurred to the special defenses pleaded, which demurrer was overruled. Thereupon the appellant moved that special matters of defense be stricken and subsequently the motion to strike was withdrawn by the appellant.

The cause was heard by the court by consent of the parties without the intervention of a jury.

At the conclusion of the testimony the court found ~~the~~ for the appellee and rendered judgment against the appellant for costs of suit. This appeal followed.

It appears that the plaintiff in error was appointed receiver by the Circuit Court of Stephenson County on December 10, 1924. On a bill filed on December 9, by one A. R. Dry against the L. M. Gross Company and a number of individuals alleged to be stockholders or creditors of the corporation; that during the time

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holders or creditors of the corporation; that during the time

that the said Alexander H. Steenrod, was acting as receiver for the said L. M. Gross Company, it appears that he had obtained from the appellant certain moneys and gave the instrument in writing as evidence thereof, providing among other things that the certificate, being evidenced in writing, in question, is issued pursuant to authority of the Circuit Court of Stephenson County, Illinois, and its repayment, on an equality with another certificate for \$1,000.00 is to be a prior lien upon all of the assets in the hands of the undersigned receiver.

On the hearing of the case before the court, appellants offered its testimony and undertook to show that there was due by reason of the instrument of writing, declared upon in this cause from Knowlton, \$288.89.

Appellant introduced in evidence also a report filed by Steenrod, the alleged receiver, made May 7, 1925. In this report which was signed and sworn to by Steenrod, he states that he sold at public auction sale all of the assets that came into his hands as receiver, and that Knowlton, appellee, Arthur A. Haas and A. J. Clarity bid \$4,500 for the whole assets and property of the corporation, and that said Steenrod struck off and sold said assets to said Knowlton, Haas and Clarity, free and clear of incumbrances. "That said purchasers have paid and delivered to me the said purchase price and have requested a merchantable conveyance of said property."

After appellant had closed its case, appellee placed upon the witness stand Mr. R. R. Tiffany, a member of the bar of Stephenson County, who testified that he was attorney for Alexander H. Steenrod in the case in the Supreme Court of Illinois entitled Alexander H. Steenrod, Receiver, v. The L. M. Gross Company, et al, 334 Ill. 362. That the case went to the Supreme Court on an intervening petition entitled Second National Bank v. A. H. Steenrod.

Appellee also offered in evidence the original bill in chancery filed December 9, 1924, by A. R. Dry v. L. M. Gross

that the said Alexander H. Stearns, was acting as receiver for the said L. H. Gross Company, it appears that he had obtained from the appellant certain books and have the instrument in writing to evidence thereof, providing some other thing, that the certificate, being evidenced in writing, in question, is issued pursuant to authority of the Circuit Court of Stephenson County, Illinois, and the receipt, on an equality with another certificate for \$1,000.00 is to be a prior lien upon all of the assets in the hands of the undesignated receiver.

On the hearing of the case before the court, appellants offered the testimony and undertook to show that there was due by reason of the instrument of writing, declared upon in this cause from Knowlton, \$288.68.

Appellant introduced in evidence also a report filed by Stearns, the alleged receiver, made May 7, 1885. In this report which was signed and sworn to by Stearns, he states that he sold at public auction sale all of the assets that came into his hands as receiver, and that Knowlton, appellee, within A. Harn and A. J. Clarity did \$4,500 for the whole assets and property of the corporation, and that said Stearns struck off and sold said assets to said Knowlton, Harn and Clarity, free and clear of all encumbrances. "That said purchasers have said and delivered to me the said cash price and have represented a merchantable conveyance of said property."

After appellant had closed its case, appellee placed upon the witness stand Mr. R. B. Tiffin, a member of the bar of Stephenson County, who testified that he was attorney for Alexander H. Stearns in the case in the Supreme Court of Illinois entitled Alexander H. Stearns, Receiver, v. The L. H. Gross Company, et al, 334 Ill. 582. That the case went to the Supreme Court on an intervening petition entitled Second National Bank v. A. H. Stearns.

Appellee also offered in evidence the original bill in chancery filed December 8, 1884, by A. R. Day v. L. H. Gross

Company, et al; the decree of the Circuit Court of Stephenson County appointing Alexander H. Steenrod receiver of the assets of L. M. Gross Company, upon his giving bonds in the sum of \$10,000; the decree of said court authorizing Alexander H. Steenrod, receiver, to borrow \$2,500 at six per cent interest, and issue receiver's certificates, making the same a paramount lien upon all of the assets of said corporation; a decree by said court dissolving L. M. Gross Company, and authorizing Alexander H. Steenrod to sell all the assets of the corporation, L. M. Gross Company.

Appellee relies upon the case entitled Alexander H. Steenrod, receiver, v. L. M. Gross Company, 334 Ill. 362. In that case at page 369 the court having under discussion and consideration the question of the appointment of Steenrod as receiver of L. M. Gross Company among other things said; "Where the court had no general equity powers in the case it was without jurisdiction under the statute to grant the ultimate relief prayed by the bill, had no power to appoint the receiver and order him to take possession and control of the assets, and being wholly without jurisdiction in the case, its orders were void."

The case just referred to was the identical case in which the Receiver, who issued the instrument sued on in the instant case, was appointed. The document sued upon in this case was authorized to be issued by the decree of the Circuit Court of Stephenson County and some phase of the litigation brought this decree in review before the Supreme Court of this state and the decree was held to be void and of no effect.

This receiver's certificate upon which liability is predicated in this case was issued by the Receiver and came to the possession of appellant.

The decree authorizing the issuance of the certificate being void, then it follows that the certificate itself is void.

Claim is made that the Receiver is liable personally on

Company, et al; the decree of the Circuit Court of Cook County appointing Alexander H. Stearns receiver of the assets of L. M. Gross Company, upon his filing bonds in the sum of \$10,000; the decree of said court authorizing Alexander H. Stearns, receiver, to borrow \$2,500 at six per cent interest, and issue receiver's certificate, making the same a payment upon all of the assets of said corporation; a decree by said court dissolving L. M. Gross Company, and authorizing Alexander H. Stearns to sell all the assets of the corporation, L. M. Gross Company.

Appellee relies upon the case entitled Alexander H. Stearns, receiver, v. L. M. Gross Company, 234 Ill. 382. In that case at page 382 the court having under discussion and consideration the question of the appointment of Stearns as receiver of L. M. Gross Company among other things said: "here the court had no general equity power in the case it was without jurisdiction under the statute to grant the ultimate relief prayed by the bill, and no power to appoint the receiver and order him to take possession and control of the assets, and being wholly without jurisdiction in the case, its orders were void."

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This receiver's certificate upon which liability is predicated in this case was issued by the Receiver and came to the possession of appellant. The decree authorizing the issuance of the certificate being void, then it follows that the certificate itself is void. Claim is made that the Receiver is liable personally on

this certificate, but we think not. In *Turner v. P. & S. R. R. Co.*, 95 Ill. 134, the court having under discussion a similar instrument said at page 146:

"Certificates of indebtedness made by a receiver under the direction of the court, binds no one personally, nor can any action be maintained on such instruments against anyone."

It is contended that those signing the certificate as sureties, guarantors or otherwise, are liable; with this we cannot agree as it is axiomatic, and citation of authority is unnecessary, to say that the liability of the sureties follows that of the principal.

A receiver's certificate such as this is not a negotiable instrument as that term is used in commercial transactions and the law governing them.

"In the first place, they are not payable unconditionally out of any fund. Whether, in any event, they are payable in full, depends on the question, whether the fund under the control of the court is sufficient for that purpose. That fact can not be known except upon inquiry into the amount of such certificates issued by the officer authorized to act, and as to the value of the fund to be administered. A bill of exchange is not good when drawn payable out of a particular fund that is uncertain and contingent. The fund out of which payment is to be made must be certain, as well as the obligation of the maker or drawer." *Turner v. P. & S. R.R. Co.*, supra.

The paper sued upon not being negotiable, therefore, it has not the characteristics of such paper and there does not attach thereto the liabilities usually incident to negotiable commercial paper.

The view we take of this case is that the sureties on this certificate sued upon are not liable thereon because the receiver who signed it as such is not liable for the reason the decree of the court authorizing its issuance is absolutely void.

The decision of the Circuit Court of Stephenson County was proper and its judgment in this case is hereby affirmed.

Affirmed.

this certificate, but we think not. In *Turner v. P. & S. B. Co.*, 95 Ill. 124, the court having under discussion a similar instrument said at page 145:

"Certificates of indebtedness made by a receiver under the direction of the court, bind no one personally, nor can any action be maintained on such instruments against anyone."

It is contended that those signing the certificate are trustees, guarantors or otherwise, and liable; with this we cannot agree as it is axiomatic, and citation of authority is unnecessary, to say that the liability of the trustees follows that of the principal.

A receiver's certificates such as this is not a negotiable instrument as that term is used in commercial transactions and the law governing them.

"In the first place, they are not payable unconditionally out of any fund. Whether, in any event, they are payable in full, depends on the question, whether the fund under the control of the court is sufficient for that purpose. That fact can not be known except upon inquiry into the amount of such certificates issued by the officer authorized to act, and as to the value of the fund to be administered. A bill of exchange is not good when drawn payable out of a particular fund that is uncertain and contingent. The fund out of which payment is to be made must be certain, as well as the collection of the money or demand." *Turner v. P. & S. B. Co.*, supra.

The paper need upon not being negotiable, therefore, it has not the characteristics of such paper and there does not attach thereto the liabilities usually incident to negotiable commercial paper.

The view we take of this case is that the trustees on this certificate sued upon are not liable thereon because the receiver who signed it as such is not liable for the reason the trustee of the court authorized its issuance is absolutely void. The decision of the Circuit Court of Stephenson County was proper and its judgment in this case is hereby affirmed.

STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and thirty-_____

Clerk of the Appellate Court

AT A TERM OF THE APPELLATE COURT.

Begun and held at Ottawa, on Tuesday, the second day of February, in
the year of our Lord one thousand nine hundred and thirty-two,
within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.

Hon. FRED G. WOLFE, Justice.

Hon. JAMES S. BALDWIN, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

265 I.A. 612³

BE IT REMEMBERED, that afterwards, to-wit: On

FEB 18 1932 the opinion of the Court was filed in the

Clerk's office of said Court, in the words and figures
following, to-wit:

HATTIE RUMMELL,

Appellee

vs.

THE DAY CARPET & FURNITURE

CO., a corporation

Appellant

Appeal from the

Circuit Court of

Peoria County.

Baldwin, J.

This is an appeal from a judgment rendered in an action for negligence in the sum of \$2500.00. The declaration consisted of two counts. The first count charged that appellant's duty was "to exercise every degree of reasonable care for the safety of the plaintiff, etc.," and "that the defendant negligently permitted the part of the floor in its store set apart as a passage way to become unsafe for patrons to walk upon; that plaintiff fell to the floor and was injured." The second count charged "that defendant, by and through its agents, permitted the surface of the passage way in said store set apart for patrons, including the plaintiff, to enter and exit, to be covered with a slippery and slick material, to-wit: wax; that when she was walking along said passage way upon the premises of the defendant, she fell on account of said slippery condition of the surface there."

Appellant filed the plea of general issue and a trial was had. The appellee is a housewife, fifty-three years old, five feet eight inches tall and weighed 180 pounds. She and her husband on March 31, 1930, at about 3 o'clock in the afternoon, went to the store of appellant in Peoria. They had been there quite often before and she was very familiar with the store--had visited ^{it} ~~at~~ last time only two weeks before the day of the accident. The purpose of her visit that day was to make a purchase in the drapery department. The day was light and clear. The store has

A copy from the
District Court of
Leone County.

HATTIE BROWNELL,
vs.
THE DAY CARPET & FURNITURE
CO., a corporation
Appellant

Baldwin, J.

This is an appeal from a judgment rendered in an action for negligence in the sum of \$500.00. The declaration consisted of two counts. The first count charged that appellant's duty was "to exercise every degree of reasonable care for the safety of the plaintiff, etc.," and "that the defendant negligently permitted the part of the floor in its store set apart as a passage way to become unsafe for patrons to walk upon; that plaintiff fell to the floor and was injured." The second count charged "that defendant, by and through its agents, permitted the surface of the passage way in said store set apart for patrons, including the plaintiff, to enter and exit, to be covered with a slippery and slick material, to-wit: wax; that when she was walking along said passage way upon the premises of the defendant, she fell on account of said slippery condition of the surface there."

Appellant filed the plea of general issue and a trial was had. The appellee is a housewife, fifty-three years old, five feet eight inches tall and weighed 100 pounds. She and her husband on March 31, 1930, at about 3 o'clock in the afternoon, went to the store of appellant in Leone. They had been there quite often before and she was very familiar with the store--had visited it last time only two weeks before the day of the accident. The purpose of her visit that day was to make a purchase in the grocery department. The day was light and clear. The store has

only one main entrance leading from the street into the store. The aisle upon which it is alleged appellee was injured extends from the entrance door straight through the store to the drapery department a distance of about 70 feet and it is about 6 feet wide. The aisle is covered with inlaid linoleum cemented to the floor and had been there seven years.

There were no holes in the linoleum and there were no objects upon it and the floor upon which it was cemented was level from the front entrance to the rear. The surface was perfectly dry and upon entering the front door one is able to look straight down this aisle to the rear of the store.

The evidence for the appellee in this case consisted of testimony of herself, her husband and a physician who was called to attend her after the accident. The defense called thirteen witnesses and claims they are supported by the physical facts. It is claimed by appellant that appellee did not slip on the floor, but was ill and fainted. It appears in the testimony that two or three weeks prior to the day of the accident the janitor had waxed the floor, but that within a few days thereafter the wax had all worn off. The testimony shows that there were over twenty clerks working in the store on that day and that they had walked over the place where the appellee fell many times; that there are an average of from forty to fifty people per hour come through the front door and use the aisle in question. Appellee fell to the floor, as she claims, slipping upon a portion thereof upon which there was wax, making it slippery; that she was walking out of the store with her head erect; she fell on her left side, her left elbow striking the floor and the bone in the upper portion of her arm was broken by the Ball. There is no dispute of the fact that the injury occurred, nor that she was taken to the hospital, and the attending physician saw appellee four months after the accident; that she was in constant pain and that her arm was completely immobilized seven or eight weeks; that the type of injury was sufficient to cause restriction and some permanency was to be

only one side entrance leading from the street into the store. The aisle upon which it is alleged appellee was injured extends from the entrance door straight through the store to the rear of the store. The aisle is covered with linoleum extending to the floor and had been there seven years.

There were no holes in the linoleum and there were no objects upon it and the floor upon which it was occurred was level from the front entrance to the rear. The aisle was perfectly dry and upon entering the front door one is able to look straight down this aisle to the rear of the store.

The evidence for the appellee in this case consisted

of testimony of herself, her husband and a physician who was called to attend her after the accident. The defense called thirteen witnesses and others they are supported by the physical facts. It is claimed by appellee that appellee did not slip on the floor, but was ill and fainted. It appears in the testimony that two or three weeks prior to the day of the accident the janitor had waxed the floor, but that within a few days thereafter the wax had all worn off. The testimony shows that there were over twenty clerks working in the store on that day and

that they had walked over the place where the appellee fell many times; that there was an average of from forty to fifty people per hour come through the front door and use the aisle in question. Appellee fell to the floor, as she claims, slipping upon a portion thereof upon which there was wax, making it slippery; that she was walking out of the store with her head erect; she fell on her left side, her left elbow striking the floor and the bone in the upper portion of her arm was broken by the fall. There is no dispute of the fact that the injury occurred, nor that she was taken to the hospital, and the attending physician saw appellee four months after the accident; that she was in constant pain and that her arm was completely immobilized seven or eight weeks; that the type of injury was sufficient to cause restriction and some permanency was to be

expected from such an injury. He further testified that there was some motion in the arm, but it was limited and that he expected it would be one-half limited. An expert testified over objection that the $\frac{1}{2}$ injury was a permanent one.

Appellant claims that appellee was not exercising ordinary care for her safety at the time of the accident; that a storekeeper is not bound to make the entrance to his store or the aisle in his store for his customers to walk upon absolutely safe, he is only required to exercise reasonable care and is not an insurer of the safety of his invitees; that before appellee may recover, she must prove that the injuries sued upon were in fact or with reasonable probability caused by the alleged negligence of the appellant, and where the evidence is reasonably consistent with two hypothesis, one of which imposes liability and the other does not, the requisite preponderance of proof is lacking; and it was improper to receive the testimony of the expert in regard to injuries, which testimony was based partly upon subjective and partly upon objective symptoms, where he was not the treating physician; that plaintiff's attorney, upon the trial, made improper and prejudicial remarks in the presence of the jury, and that the judgment is against the manifest weight of the evidence.

The rule of law in cases of this character has been stated by our courts to be as follows:

"The duty to one who comes upon premises by the owner's invitation to transact business in which the parties are mutually interested, is to exercise reasonable care for his safety while on that portion of the premises required for the purpose of his visit. Under such circumstances the party is said to be on the premises by implied invitation of the owner."

Pauckner vs. Wakem, 231 Ill. 276, 280. O'Rourke vs. Field and Company, 307 Ill. 197, 199.

Dr. Vonaschen, a reputable physician in Peoria, but not the attending physician in this case, was called by appellee to testify in the case based upon an examination made of appellee on the morning of the trial. He stated that he saw objective symptoms of pathology in her left arm and described them, which were undoubtedly objective symptoms. In his description of what

expected from such an injury. The witness testified that there was some motion in the arm, but it was limited and that he expected it would be one-half limited. An expert testimony over objection that the injury was a permanent one. Plaintiff claims that appellee was not exercising ordinary care for her safety at the time of the accident; that a storekeeper is not bound to take the customer to his store or the aisle in his store for his customer is well known absolutely safe, he is only required to exercise reasonable care and is not in danger of the safety of his invitees; that before appellee may recover, she must prove that the injuries were caused in fact or with reasonable probability caused by the alleged negligence of the appellant, and where the evidence is reasonably consistent with two hypotheses, one of which imposes liability and the other does not, the requisite preponderance of proof is lacking; and it was improper to receive the testimony of the expert in regard to injuries, which testimony was based partly upon subjective and partly upon objective symptoms, where he was not the treating physician; that plaintiff's attorney, upon the trial, made improper and prejudicial remarks in the presence of the jury, and that the judgment is against the weight of the evidence.

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Proffner vs. DeLeon, 221 Ill. 218, 80 C. 2d 111, 112 and

Company, 207 Ill. 127, 128.

Dr. Venable, a reputable physician in Texas, has

not the attending physician in this case, was called by appellee to testify in the case based upon an examination made of appellee on the morning of the trial. He stated that he was objective symptoms of pathology in her left arm and shoulder area, which

he found he said, "there was approximately a 50% loss of mature function of the left arm in comparison with the right arm." This part of his answer was objected to and asked to be stricken, but the court overruled the objection and refused to strike. Then the witness was asked his opinion, entirely based upon objective symptoms, whether the pathology he had just described is or is not permanent, and his reply was that in his opinion the injury was permanent. This answer was given over the objection of appellant and his motion to strike was denied.

As will be seen by the above, this witness detailed some unquestioned objective symptoms also some subjective symptoms, i.e. "50% loss of mature function of left arm in comparison with the right arm."

This court is of the opinion that the court erred in not striking the quoted portion above from the answer of witness for it seems to us that it is perfectly obvious that the witness could not have determined that appellee had a 50% loss of mature function of left arm in comparison with the right arm except as appellee moved or attempted to move both arms at the witness' direction and thus at once demonstrated by a voluntary movement of the muscles what are known as subjective symptoms. See Ryan vs. Landon, Gen. No. 8368, and cases therein cited.

Whether or not the witness included these subjective symptoms as a basis of his later answer to the question as to whether or not the pathology he described (which included subjective symptoms), although he was asked to base his answer "entirely upon objective symptoms" is or is not permanent, is not clear to us and because his description of the pathology did contain improper elements, the jury may have been misled upon the question of a permanent injury.

Appellee testified that she had had no injury to the left arm and shoulder prior to that day; that she did not notice the surface of the floor as she went in, nor did she notice the condition of the floor as she went out; that she was walking in an ordinary gait in the regular way with her eyes toward the

he found he said, "there was approximately a 50% loss of return function of the left arm in comparison with the right arm." This part of his answer was objected to and asked to be stricken, but the court overruled the objection and refused to strike. Then the witness was asked his opinion, entirely based upon objective symptoms, whether the pathology he had just described is or is not permanent, and his reply was that in his opinion the injury was permanent. This answer was given over the objection of appellant and his motion to strike was denied.

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See Ryan vs. London, Gen. No. 3368, and cases therein cited. Neither or not the witness included these subjective

symptoms as a basis of his later answer to the question as to whether or not the pathology he described (which included

subjective symptoms), although he was asked to base his answer "entirely upon objective symptoms" is or is not permanent, is not clear to us and because the description of the pathology did contain improper element, the jury may have been misled upon the question of a permanent injury.

Appellee testified that she had had no injury to the left arm and shoulder prior to that day; that she did not notice the surface of the floor as she went in, nor did she notice the condition of the floor as she went out; that she was walking in

front of the store and observed nothing unusual about the surface of the floor as she walked along there, her foot slipped and she went down. She was talking with her husband as they were walking along and as her heel came down it slipped and she went to the floor, her left arm struck the floor at the elbow and after detailing the nature and character of the injuries she said that immediately after the accident, as she was seated in the chair, she observed the spot where she fell and could see a streak, that her heel made the streak. She claims she fainted as she was helped into a chair after she fell; that she had been in the store quite often prior to the date of the injury; that it was a bright, sunny day and she could see through to the other end as she came in the door; that the aisle was light and nothing dark about it.

Her husband, who was with her at the time of the accident, testified that as they went into the store that day the floor was level and there were no objects of any kind on the linoleum; after being at the drapery department, which was at the end of the aisle, they started out of the store; that as they walked along his wife's foot slipped and she fell to the floor, she was walking in an ordinary manner with her head up erect; that they picked her up and put her on a chair and called for a doctor; that she was conscious and told him what doctor to call; that she fainted during the process of removing her coat. After his wife fell he made an examination of the linoleum and found a streak there; that it was clear and "kind of diagonal" and probably three quarters of an inch wide and extended for 12 or 14 inches; that he saw wax on the surface of the linoleum where she had fallen and that the wax was slippery. As he came into the store that day he didn't notice the appearance of the linoleum as he walked along, nor did he notice it on the way out; that there was no object on the linoleum and no hole there. There was nothing over which a person could trip and the surface was level.

front of the store and observed nothing unusual about the appearance of the floor as she walked along there, her foot slipped and she went down. She was talking with her husband as they were walking along and as her heel came down it slipped and she went to the floor, her left arm struck the floor at the elbow and after detailing the nature and character of the injuries she said that immediately after the accident, as she was seated in the chair, she observed the spot where she fell and could see a streak, that marked the streak. The chair she testified as she was helped into a chair after she fell; that she had been in the store quite often prior to the date of the injury; that it was a bright, sunny day and she could see through to the other end as she came in the door; that the store was light and nothing dark about it.

Her husband, who was with her at the time of the accident, testified that as they went into the store that day the floor was level and there were no objects of any kind on the floor; after being at the grocery department, which was at the end of the aisle, they started out of the store; that as they walked along his wife's foot slipped and she fell to the floor, she was walking in an ordinary manner with her head up erect; that they picked her up and put her on a chair and called for a doctor; that she was conscious and told him what to do; that she faintly during the process of removing her coat. After his wife fell he made an examination of the floor and found a streak there; that it was clear and "thin and diagonal" and probably three quarters of an inch wide and extended for 12 or 14 inches; that he saw wax on the surface of the floor where she had fallen and that the wax was slippery. As he came into the store that day he didn't notice the appearance of the floor as he walked along, nor did he notice it on the way out; that there was no object in the aisle and no hole there. There was nothing over which person could trip and the surface was level.

Dr. Jenkins, the attending physician, testified that he got to the scene of the accident about fifteen minutes after he was called or probably a half hour after the accident, and found appellant reclining in a chair and described the nature of the injuries as he found them, which is not disputed. He observed the linoleum and said that it was a polished floor, slippery.

This is substantially all of the evidence offered on behalf of appellee concerning the incidents surrounding the accident.

The appellant called a number of witnesses upon the question of the accident and the condition of the floor and a brief resume of these witnesses will be here given.

Will Gann, the porter, stated that his duties were to take care of the floor and on the morning of the accident he swept the floor with a dry brush; that there was nothing put on the floor that day. The floor had been waxed three or four weeks before that and it was dry, but was not slippery; that he saw the place where appellee claimed to have slipped a few minutes after the accident and made an examination of the entire floor covering from the door back to the rear of the store and found the floor dry and that it was not slippery; that there were no marks on the floor; that there was no wax on the floor covering that day and nothing to indicate that there was any wax on it that day; that there were on that day 65 to 75 people per hour traveling that floor covering from the front of the store to the rear and there were 40 people working in the store; that this floor had been cleaned during the three or four weeks prior to the day of the accident with a push brush; that there was light on this floor covering in the main aisle and 60300 watt electric lights were burning over the aisle; that after a floor is waxed it does not take many days to wear off the wax on the surface, about three or four. That he put wax on the floor to save work and that it is put on every sixty days and is entirely gone off the top after three or four days.

Mr. Jackson, the attending physician, testified that he got to the scene of the accident about fifteen minutes after he was called or probably a half hour after the accident, and found appellant reclining in a chair and described the nature of the injuries as he found them, which is not disputed. He observed the floor and said that it was a polished floor, slippery.

This is substantially all of the evidence offered on behalf of appellee concerning the incidents surrounding the accident.

The appellant called a number of witnesses upon the question of the accident and the condition of the floor and a brief resume of these witnesses will be here given.

Will Dunn, the porter, stated that his duties were to take care of the floor and on the morning of the accident he swept the floor with a dry brush; that there was nothing out on the floor that day. The floor had been swept three or four weeks before that and it was dry, but was not slippery; that he saw the place where appellee claimed to have slipped a few minutes after the accident and made an examination of the entire floor covering from the door back to the rear of the store and found the floor dry and that it was not slippery; that there were no marks on the floor; that there was no wax on the floor covering that day and nothing to indicate that there was any wax on it that day; that there were on that day 60 to 75 people per hour traveling that floor covering from the front of the store to the rear and there were 40 people working in the store; that this floor had been cleaned during the three or four weeks prior to the day of the accident with a push brush; that there was light on this floor covering in the main aisle and 6-300 watt electric lights were burning over the aisle; that after a floor is waxed it does not take many days to wear off the wax on the surface, about three or four. That he put wax on the floor to save work and that it is put on every sixty days and is entirely gone off the top after three or four days.

Oberlander, a checking clerk for appellant, said he was about twenty-five feet from where she fell at the time and that he saw her "weaving" immediately before she fell and that she was right in the aisle and went down in a "heap". That there was no slipping, she went down in a heap.

The elevator operator of appellant said that she saw her "just kind of fall to the floor," that she saw the floor where appellee fell, it was not slippery and saw no marks where she fell; that she had been over that floor before that day a good many times and was over it a good many times every day, that the floor was not slippery that day.

A Mrs. Ground, a customer, was in the store that day at the time of the accident; that she came through the front door and down this aisle and saw the floor covering as she walked; that she walked over the place where appellee fell; that the aisle was not slippery, was not wet and the store was well lighted.

A Mrs. Hayslip, a saleslady of appellant, saw the plaintiff lying in the center of the aisle; that she saw the floor as soon as she was moved and that it was not slippery; had walked over it five or six times that day, but had not made any minute inspection of the floor.

Grant Guthrie, manager of the drapery department of appellant, said he had passed over the floor where appellee fell ten or fifteen times that day and observed the condition of the floor covering and it was not slippery and after plaintiff was removed saw no marks to indicate that anyone had slipped; that he had inspected the floor and could find no marks of any kind. He knew wax had been put on the linoleum and that it was polished and ordinary wax applied; that it had been three or four weeks prior to the date of the accident that any wax had been put on the floor.

Schmidt, an assistant manager, saw the condition of the floor covering at least four different times that day and that it was not slippery; that there were no marks on the floor and that it had been ten days or two weeks since wax had been

Operator, a cleaning clerk for apartment, said he was about twenty-five feet from where she fell at the time and that he saw her "wobbling" immediately before she fell and that she was right in the aisle and went down in a heap. That there was no slipping, she went down in a heap.

The elevator operator of apartment said that she saw her "just kind of fall to the floor," that she saw the floor where appellee fell, it was not slippery and saw no marks where she fell; that she had been over that floor before that day a good many times and was over it a good many times every day, that the floor was not slippery that day.

A Mrs. Ground, a customer, was in the store that day at the time of the accident; that she came through the front door and down the aisle and saw the floor covering as she walked; that she walked over the place where appellee fell; that the aisle was not slippery, was not wet and the store was well lighted.

A Mrs. Havelip, a saleslady of appellee, saw the appellee still lying in the center of the aisle; that she saw the floor as soon as she was moved and that it was not slippery; had walked over it five or six times that day, but had not made any minute inspection of the floor.

Grant Gattis, manager of the grocery department of appellee, said he had passed over the floor where appellee fell ten or fifteen times that day and observed the condition of the floor covering and it was not slippery and after plain-tiff was removed saw no marks to indicate that anyone had slipped; that he had inspected the floor and could find no marks of any kind. He knew wax had been put on the linoleum and that it was polished and originally wax applied; that it had been three or four weeks prior to the date of the accident that any wax had been put on the floor.

Schmidt, an assistant manager, saw the condition of the floor covering at least four different times that day and that it was not slippery; that there were no marks on the floor and that it had been ten days or two weeks since wax had been

A Mrs. Keckley, an employee of appellant, stated that she was in the aisle a dozen times that day and that she did not see any slippery places.

Henry Wolf, a bookkeeper of appellant, said that he walked on the aisle six or seven times that day, but didn't make any special observations and did not see any slippery places.

Mr. Morris, office manager of appellant, said that he made a special examination of the floor where appellee fell within a few minutes after the accident, found nothing unusual in the appearance and did not find any slippery or slick places. The floor covering was dry and there were no marks upon the floor at the place where appellee claims to have fallen and no appearances of any wax and that the floor had been waxed three or four weeks prior and was swept each day with a dry brush; that the average number that came into the store per hour was 50 to 60 people and that all of them used the aisle; that after the floor is waxed within four or five days thereafter there is no evidence of wax upon the surface, that the wax is taken up by the pores of the linoleum; that the wax was not ~~scrapped~~ scraped off after the accident; that he knew every time the floor was waxed. This witness was secretary of the company and sat at the side of appellant's counsel during the trial. Some attempt was made to show his personal interest in the matter, but in the view we take of this case we do not believe that is material.

A Mrs. Kent, a switchboard operator in appellant's store, observed the condition of the floor that day, walked over it three times, did not observe any slippery condition.

One Hartquist, a salesman for appellant, whose duties took him all over the store, saw appellee seated in the chair after the accident and observed the condition of the floor, saw nothing unusual. There were no slippery places on the floor, there were none on the floor that day; that he walked over the aisle 200 times; that they did not wash the wax off after the

A Mr. Kookley, an employee of appellant, stated that she was in the aisle a dozen times that day and that she did not see any slippery places.

Henry Wolf, a bookkeeper of appellant, said that he walked on the aisle six or seven times that day, but didn't make any special observations and did not see any slippery places.

Mr. Morris, office manager of appellant, said that he made a special examination of the floor where appellee fell within a few minutes after the accident, found nothing unusual in the appearance and did not find any slippery or slick places. The floor covering was dry and there were no marks upon the floor at the place where appellee claims to have fallen and no appearance of any wax and that the floor had been waxed three or four weeks prior and was swept each day with a dry brush; that the average number that came into the store per hour was 30 to 35 people and that all of them used the aisle; that after the floor is waxed within four or five days thereafter there is no evidence of wax upon the surface, that the wax is taken up by the wear of the linoleum; that the wax was not removed scraped off after the accident; that he knew every time the floor was waxed. This witness was secretary of the company and sat at the side of appellant's counsel during the trial. Some attempt was made to show his personal interest in the matter, but in the view we take of this case we do not believe that is material.

A Mrs. Kent, a waitress and operator in appellant's store, observed the condition of the floor that day, walked over it three times, did not observe any slippery condition. One Hartman, a salesman for appellant, whose duties took him all over the store, saw appellee seated in the chair after the accident and observed the condition of the floor, saw nothing unusual. There were no slippery places on the floor, there were none on the floor that day; that he walked over the aisle 200 times; that they did not wash the wax off after the

accident; that the floor covering was inlaid linoleum and is generally used for floor covering for store entrances and aisles and is the same kind of floor covering, weight and quality, as is generally used in public buildings in the city. In five or six days after the floor is waxed the wax is entirely worn off the surface.

Thus, it will be seen there were three witnesses called by appellee to testify as to the condition of the floor at the place where plaintiff fell on the day of the accident, and appellant called twelve witnesses, most of whom were employees in the store who had occasion to use the aisle in question frequently in the performance of their duties. One of these witnesses, however, was a customer who happened to be in the store at the time of the accident. Some of these witnesses carefully scrutinized the place where appellee fell and others just noticed the general conditions of the floor and so far as this record appears no other persons slipped on the floor that day, nor at any other time, and on this question it is our firm conviction that the overwhelming weight of the testimony was to the effect that there was no wax or slippery places on the floor at the place where appellee fell on the day in question.

Appellant claims that appellee at or about the time she fell was ill and fainted and was obliged to leave the store because of illness. There were a number of witnesses on this point.

Oberlander, a checking clerk for appellant, saw appellee fall and talked to her, but did not ask her any questions and she said she felt dizzy and very weavy and was trying to find a place to sit down and that he heard her husband say when he was within two feet of appellee that appellee wasn't feeling good in the morning.

The elevator operator testified that appellee took her hat off when in the drapery department and asked her husband if she hadn't been feeling very good that morning, and he said "No, she hadn't been feeling very good that morning, she had been dizzy and had an awful headache."

accident; that the floor covering was a light-colored material and is generally used for floor covering for store entrances and aisles and is the same kind of floor covering, weight and quality, as is generally used in public buildings in the city. In five or six days after the floor is waxed the wax is entirely worn off the outside.

Thus, it will be seen there were three witnesses called by appellee to testify as to the condition of the floor at the place where plaintiff fell on the day of the accident, and appellant called twelve witnesses, most of whom were employees in the store who had occasion to use the aisle in question frequently in the performance of their duties. One of these witnesses, however, was a customer who happened to be in the store at the time of the accident. Some of these witnesses carefully scrutinized the place where appellee fell and others just noticed the general condition of the floor and so far as this record shows no other persons slipped on the floor that day, nor at any other time, and on this question it is our firm conviction that the overwhelming weight of the testimony was to the effect that there was no wax or slippery places on the floor at the place where appellee fell on the day in question.

Appellant claims that appellee fell on or about the time she fell was ill and faint and was obliged to leave the store because of illness. There were a number of witnesses on this point.

Overlander, a checking clerk for appellee, saw appellee fall and talked to her, but did not ask her any questions and she said she felt dizzy and very nervous and was trying to find a place to sit down and that he heard her husband say when he was within two feet of appellee that appellee wasn't feeling good in the morning.

The elevator operator testified that appellee took her hat off when in the elevator department and asked her husband if she hadn't been feeling very good that morning, and he said "No, she hadn't been feeling very good that morning, she had

A Mrs. Stillwell, who waited on her in the drapery department, said that appellee was there about twenty minutes and that just before she left, appellee said to witness, "I have such a headache, I will have to let this go until another day."

Mrs. Ground, a customer in the store, said that she was in the drapery department and while there heard the saleslady ask appellee something about her deciding and appellee said, "she could not decide then because she had to get to the air."

Witness Hayslip, a saleslady of appellant, saw plaintiff lying in the aisle after the fall and helped her into a chair. After she was seated in the chair, heard husband say in appellee's presence, "She slipped," and appellee said, "I felt myself going." Appellee said she had a headache. That appellee fainted in the chair and then when they were taking her coat off, appellee fainted again.

Guthrie, the manager of the drapery department, testified that he came to the scene of the accident shortly afterwards and heard appellee say, "I must have fainted." He talked ~~to~~ with her husband and husband said, "She should not have come out today because she wasn't feeling well."

Thus, it will be seen that there were five witnesses for appellant who testified on the question of the physical condition of appellee just before the accident and immediately thereafter and as to certain statements made by herself and her husband in her presence.

Appellee and her husband were upon cross examination by appellant in the presentation of plaintiff's side in this case asked concerning these various statements as to her physical condition and of the facts thus testified to and denied them, therefore, as to whether or not appellee was ill and dizzy and fainted, instead of slipping and fell on the floor that day was a controverted question with the weight of the testimony, as we believe from a careful reading of the record, preponderating

A Mrs. Tallent, who visited on her in her grocery department, said that Spellicee said there were twenty minutes and that before she left, Spellicee said to witness, "I have such a headache, I will have to get back to my office another day."

Mrs. Brown, a customer in the store, said that she was in the grocery department and while there heard the witness ask Spellicee something about her headache and Spellicee said, "She could not leave then because she had to get to the office."

Witness Taylor, a saleslady of Spellicee's, was sitting in the aisle after the fall and helped her into a chair. After she was seated in the chair, witness Brown was in Spellicee's presence, "She slipped," and witness said, "I felt myself going." Spellicee said she had a headache. That Spellicee fainted in the chair and then when they were taking her coat off, Spellicee fainted again.

Witness, the manager of the grocery department, testified that he came to the scene of the accident shortly afterwards and heard Spellicee say, "I must have fainted." He talked in with her husband and husband said, "She should not have come out today because she wasn't feeling well."

Thus, it will be seen that there were five witnesses for Spellicee who testified to the condition of the physical condition of Spellicee just before the accident and immediately thereafter and as to each in statements made by herself and her husband in her statement.

A police and her husband were upon scene examination by Spellicee in the presentation of Plaintiff's side in this case asked concerning these various statements as to her physical condition and of the facts thus testified to and denied them, therefore, as to whether or not Spellicee was ill and dizzy and fainted, instead of slipping and fell on the floor that day, was a controverted question with the weight of the testimony as we believe from a careful reading of the record, preponderating

in favor of appellant's contention, although if that were the only question in the record, we would not feel disposed to set the verdict aside on that account. Believing as we do that the manifest weight of the evidence in this case was to the effect that the floor in question was not slippery and that there was no wax thereon at the place where appellee claims she slipped and fell as shown by the clear weight of the testimony, and, in addition thereto, the preponderance of the evidence as we find being to the effect that appellee was ill and probably fainted and fell to the floor, instead of slipping, and the record containing the error in reference to the introduction of expert testimony as hereinbefore pointed out, we are of the opinion that the verdict in this case was manifestly against the weight of the evidence and should be set aside and the cause reversed and remanded for another trial.

Appellant claims that the conduct of appellee's counsel during the course of the trial was improper. The court, upon its attention being called to these complaints, properly ruled on the question and, while these remarks and statements were made in the heat of the trial and probably not intentional, yet, they may have had something to do with the verdict rendered and while we consider such conduct improper, we do not think standing alone it would be sufficient to reverse the case.

Upon the oral argument in this case appellant made a motion to strike an additional abstract from the files, but in the view we take of this case and the result as herein announced, we believe the motion of appellant should be denied.

Reviewing courts are very reluctant to set aside verdicts of juries upon questions of fact, but where from a careful reading of the record and a consideration of the entire testimony offered as shown by the record, that seems to be the only course to pursue in order that justice may prevail in our courts then it is the plain duty of those having the power to review to promote justice by setting aside improper verdicts and remanding the cause for another trial.

in favor of appellant, a contention, although it must be
only mention in the record, we could not well discuss it
the verdict aside on that account. Believing as we do that the
manifest weight of the evidence in this case was to the effect
that the floor in question was not slippery and that there was
no wax thereon at the place where appellee claimed she slipped,
and fell as shown by the clear weight of the testimony, and,
in addition thereto, the presence of the evidence of the
thing being to the effect that appellee was ill and weakly
fainted and fell to the floor, instead of slipping, and the
record containing the error in reference to the instruction of
expert testimony as hereinbefore pointed out, we are of the
opinion that the verdict in this case was manifestly against
the weight of the evidence and should be set aside and the cause
reversed and remanded for another trial.

Appellant claims that the conduct of appellee's counsel
during the course of the trial was improper. The court, upon the
attention being called to these complaints, properly ruled on the
question and, with these remarks in substance, "You are to be
the best of the trial and, obviously not prejudicial, yes, they
may have had something to do with the verdict rendered and
while we consider such cause for complaint, we do not think
standing alone it could be sufficient to reverse the case.
Upon the oral argument in this case appellant made
a motion to strike an objectionable statement from the files, but
in the view we take of this case and the weight of the
evidence, we believe the action of appellant should be denied.
Revising courts are very reluctant to set aside
verdicts of juries upon questions of fact, but where there is
a general feeling of the weight and a conviction of the justice
testimony offered as shown by the record, that seems to be the
only course to pursue in order that justice may prevail in our
courts and it is the plain duty of those having the power to
review to promote justice by setting aside a verdict which is
and remanding the cause for another trial.

This cause is reversed and remanded for the reasons
as set forth herein.

Reversed and remanded.

This case is reversed and remanded for the reasons

set forth herein.

Reversed and remanded.

STATE OF ILLINOIS.

SECOND DISTRICT

} ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and thirty-_____

Clerk of the Appellate Court

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the second day of February, in the year of our Lord one thousand nine hundred and thirty-two, within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.

Hon. FRED G. WOLFE, Justice.

Hon. JAMES S. BALDWIN, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff. /

265 I.A. 612⁴

BE IT REMEMBERED, that afterwards, to-wit: On

FEB 18 1932

the opinion of the Court was filed in the

Clerk's office of said Court, in the words and figures

following, to-wit:

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

October Term, A.D. 1931

Service Sand & Gravel
Company, a Corporation,
Appellant,

vs.

Appeal from Circuit Court
of Winnebago County

E.W. Larson, Hilmer Larson,
Arthur Larson, Frank Larson
and Raymond Johnson,
Appellees.

BALDWIN, J:

The appellant will be referred to as plaintiff and the appellees as defendants.

In this case plaintiff seeks to recover from the defendants compensation for a large quantity of untreated sand and gravel, alleged to have wrongfully been removed by defendants from plaintiff's property and appropriated to defendant's own use.

To plaintiff's original declaration defendants interposed a general demurrer. This demurrer was sustained and the plaintiff, pursuant to leave, filed an amended declaration consisting of one count, which is based upon a lease-contract between the plaintiff as lessor and the defendants as lessees.

On behalf of the defendants the general demurrer, interposed to the original declaration, was by the Court ordered to stand as demurrer to the amended declaration. Upon a hearing this general demurrer to the amended declaration was

Gen. No. 1482

Oct. 10, 1931

IN THE
COURT OF COMMON PLEAS
FOR THE COUNTY OF COLUMBIA

October Term, A.D. 1931

Service made by
process, a copy of
which is attached
hereto.

Appeal from Circuit Court
of Columbia County

vs.

J. J. Lamm, William Lamm,
Arthur Lamm, Frank Lamm,
and Harry Lamm,
Appellants.

WITNESSES:

The appellant will be referred to as Plaintiff and

the appellee as defendant.

In this case Plaintiff seeks to recover from the de-

fendant compensation for a large quantity of material used
and gravel, also to have wrongfully taken removal of defend-
ant from Plaintiff's property and to require to defendant's

own use.

To Plaintiff's original declaration defendant inter-
posed a general demurrer. This demurrer was sustained and the
plaintiff, pursuant to leave, filed an amended declaration com-
prising of one count, which is based upon a lease-contract be-
tween the plaintiff as lessor and the defendant as lessee.

On behalf of the defendant the general demurrer, in-
terposed by the original declaration, was withdrawn and the
case is set for trial on the amended declaration. There is
nothing in the general demurrer or the amended declaration and

sustained; to which ruling of the Court, plaintiff, by its counsel, duly excepted and elected to stand by its amended declaration. Thereupon a judgment for costs and that the plaintiff took nothing was entered against the plaintiff; to which judgment plaintiff, by its counsel, duly excepted. From this judgment plaintiff prayed this appeal, which was granted.

The sole question submitted to this Court for determination is this:

Did the trial court commit error in sustaining defendants' demurrer to plaintiff's amended declaration; or, in other words, does plaintiff's amended declaration state a cause of action?

The declaration charges that the plaintiff was engaged in the treating, excavating and selling sand, etc., and the manufacture of cement blocks and operating a sand and gravel plant; that the sand and gravel thus used was taken from a tract of land known as the "Brown Tract," and that had never used the sand from this tract in its business except to take sand therefrom and treat it in the plant, in other words, did not sell the untreated sand and gravel to the buying public; that the defendants had all been employed theretofore by the plaintiff and were well acquainted with the plant in which plaintiff conducted its business, including the disposition of the sand and gravel taken from this tract; that the defendants thereafter entered into negotiations with the plaintiff for a lease of the property and the negotiations cul-

minated in the execution of a document under which defendants went into possession of the land and operated it for the period set forth in the lease; that this document was in general terms a lease of the plant for a period of two years from November 1st, 1928, for which they were to pay \$19,000.00

maintained; to which ruling of the Court, Plaintiff, by its counsel, duly excepted and elected to stand by its amended declaration. Thereupon a judgment was entered and that the Plaintiff took nothing was entered against the Plaintiff; to which judgment Plaintiff, by its counsel, duly excepted. From this judgment Plaintiff prays this writ, which was granted.

The sole question submitted to this Court for determination is this:

Did the first grant contain error in its terms? Defendants' answer to Plaintiff's amended declaration; or, in other words, does Plaintiff's amended declaration state a cause of action?

The declaration alleges that the Plaintiff was employed in the treatment, excavating and building, etc., and the manufacture of cement blocks and operating a sand and gravel plant; that the said and gravel plant was taken from a tract of land known as the "Brown Tract," and that said never had and from this tract in the business except to take sand therefrom and treat it in the plant, in other words, did not sell the untreated sand and gravel to the Plaintiff; that the defendant had all been employed therebefore by the Plaintiff and were well acquainted with the plant in which Plaintiff conducted its business, including the disposition of the sand and gravel taken from this tract; that the defendant thereafter entered into negotiations with the Plaintiff for a lease of the property and the negotiations resulted in the execution of a document under which defendants went into possession of the land and operated as the sand and gravel plant in the tract; that this document was in general terms a lease of the plant for a period of ten years from November 1st, 1924, for which they were to pay \$12,000.00

a year. The defendants were to have the right to use the machinery and equipment, but were required to keep it in good repair, carrying insurance, procuring licenses for trucks, etc., that what was believed to be the most important part of the lease is the following paragraph:--

"Said second parties shall also have the use of all land around the plant as far north as the creek and shall have access to all the sand and gravel on the Brown tract, containing seventy acres, located South of Road to gravel plant, where sand and gravel is now being dug, during the term of this agreement, and said second parties hereby agree to dig the gravel to the bottom, making a clean job of the same as far as they go, except, however, if there should be spots where the stripping exceeds five feet in depth or where the sand and gravel is of a very bad quality; then, under such conditions, said second parties are permitted to pass by such bad places without digging. All sand and gravel in stock piles November 1, 1928, may be taken by said second parties the same as the gravel in the pit.";

that said lease contained an option for a renewal for a period of three years from November 1st, 1930, upon giving notice prior to July 1st, 1930; that on the "Brown Tract" was sufficient sand and gravel available to supply the gravel and cement plants with the normal demand for a period of twelve to fifteen years; that the lease terminated on November 1st, 1930, defendants having taken possession November 1st, 1928; that defendants did not exercise their option to renew the contract; that from the time the defendants took possession of plant and property under the lease, until on or about October 9th, 1930, the defendants took and removed from the said "Brown Tract" only such sand and gravel as was required in operating the sand and gravel plant, etc; that on or about October 9th, 1930, a few days before the expiration of the lease, they began to excavate and remove from the "Brown Tract" sand and gravel and so took 3000 cubic yards of gravel, of the value of \$1.00 per yard and 350 cubic yards of sand, of the value of \$1.00 per yard, and did not use such gravel and sand in the

a year. The defendants were to have the right to use the machinery and equipment, but were prohibited to use it in food, etc., carrying insurance, processing livestock, etc., etc. that what was believed to be the most important part of the

lease is the following paragraph:--

"said second parties shall have the use of all land shown the front of the north of the creek and shall have access to all the land and gravel on the known tract, including the gravelly area, located north of road to gravel pit, where sand and gravel is now being dug, during the term of this agreement, and shall be entitled to use a free use of all the gravel in the bottom, during a season for of the year as they may desire, however, if there should be spots where the straining of the gravel is not in depth or where the sand and gravel is of a very bad quality; then, under such conditions, said second parties are permitted to pass or send their places without any fine. All sand and gravel in stock shall be taken by said second parties the 1, 1933, may be taken by said second parties the same as the gravel in the pit."

that said lease contained an option for a renewal for a period of three years from November 1st, 1930, upon giving notice prior to July 1st, 1930; but on the "known tract" was sufficient sand and gravel available to supply the gravel and cement pits with the normal demand for a period of twelve to fifteen years; that the lease terminated on November 1st, 1930, defendants having taken possession November 1st, 1928; that defendants did not exercise their option to renew the contract; that from the time the defendants took possession of plant and property under the lease, until on or about October 25th, 1930, the defendants took and removed from the said "known tract" only sand and gravel as was required in operation of the plant and gravel pits; that on or about October 25th, 1930, a few days before the expiration of the lease, they caused to be removed from the "known tract" sand and gravel and on about 3000 cubic yards of gravel, of the value of 1.00 per yard and 250 cubic yards of sand, of the value of 1.00 per yard, and all was sent gravel and sand in the

operation of the sand and gravel plant, but removed this sand and gravel from the premises; that it was not taken and removed in good faith, but was taken and removed and was sold by the defendants after the lease agreement terminated;^{that} by reason of the alleged removal and use of said sand and gravel, beginning on or about October 9th, which plaintiff claims was not intended to be covered by the lease agreement the defendants are liable to the plaintiff for its value or \$3,350.00.

The plaintiff contends that by the agreement the defendants were granted access to the "Brown Tract" and the right to excavate and take therefrom only such sand and gravel as was required for the operation of the sand and gravel plant during the period covered by the lease; while the defendants claim that they had the right to excavate and remove from premises such sand and gravel as they desired, whether it was "run through" the sand and gravel plant for treatment, separation, etc., or disposed of directly to consumers or otherwise. Plaintiff further contends that, inasmuch as defendants operated plant for almost two years, except the last few days, along the line of their contention, that is, only excavating and removing such sand and gravel as was to be treated in the plant, they thereby by such use and course of conduct, established that that was the intention of the parties and was the construction placed upon the contract by the defendants.

The demurrer to the declaration presents the question for decision by this Court, and involves the construction of the contract, or so much thereof as appears pertinent to the question here raised.

Many rules are suggested by the plaintiff that have been announced by the Courts as a proper way to construe a contract in controversy, among them being that the Courts will always look to its purpose and where the language is susceptible of more than one construction, to construe in the light of circumstances sur-

operation of the sand and gravel plant, but removed from the
and gravel from the plant; that it was not taken and re-
moved in good faith, but was taken and removed and was sold by
the defendant after the lease was terminated; by reason
of the illegal removal and use of said sand and gravel, be-
lieving in or about October 1911, which plaintiff claims was
not intended to be covered by the lease agreement for the reasons
one liable to the plaintiff for the value of \$4,000.00.

The plaintiff contends that by his agreement and de-
claration were granted to the defendant and the right
to excavate and take therefrom only such sand and gravel as
was required for the operation of the sand and gravel plant
during the period covered by the lease; while the defendant
claims that they had the right to excavate and remove from
premises sand and gravel as they desired, whether it was
"run through" the sand and gravel plant for treatment, or first-
hand, etc., or disposed of directly to contractors or otherwise.
Plaintiff further contends that, inasmuch as defendant operated
the plant for almost two years, except the last few days, along
the line of their contention, that is, only excavating and re-
moving such sand and gravel as was to be treated in the plant,
they thereby by their use and sales of sand and gravel established that
that was the intention of the parties and was the construction
placed upon the contract by the defendant.

The answer to the declaration pleads the respec-
tion for decision by this Court, and involves the construction of the
contract, it so much thereof as a party defendant to the action
here raised.

It is also to be noted that the plaintiff has made no
reference to the Court as having any way to conduct a business in
connection with the plant, and that the Court will always look to
the parties and their intentions in such cases of such kind
construed, to determine the true intent of the parties.

rounding the parties at the time it was made, to give effect under such circumstances to the intention of the parties, as gathered from the entire instrument; that the interpretation of the instrument should be a reasonable one and that if the meaning of a contract is in any respect doubtful or uncertain and the parties to it have given to it a practical construction of its terms by their conduct, then such construction is entitled to weight in determining its proper interpretation, and many of the cases cited in support of these various rules are well considered and are generally accepted as authority upon the propositions.

In the view we take of this case we do not see any reason for stressing them in an attempt to apply them to facts as expressed in this declaration.

These defendants were granted permission to operate the plant and were required to keep it in repair and pay other expenses, and in addition to that, were given access to the sand and gravel on the "Brown Tract." This was the commodity that defendants were desirous of obtaining and disposing of in their business and in the excavation and removal of this sand and gravel they no doubt used some of the equipment of the sand and gravel plant, which they had a right to do.

There does not seem to be in the contract anywhere, any express direction that the sand and gravel so excavated from the "Brown Tract" or taken from the stock piles, had to be crushed, washed, screened, assorted, etc., before it was disposed of by defendants. In other words, it does not appear that this sand and gravel must be "run through and treated in and by the sand and gravel plant" and if that had been the intention of the parties at the time the contract or lease was executed, it would have been a simple matter to have inserted such a provision.

...the parties at the time it was made, to give effect
under each circumstance to the intention of the parties, as
gathered from the entire instrument; that the interpretation of
the instrument should be a construction of the whole and not
of a contract in any respect doubtful or uncertain and
the parties to it have given to it a great deal of consideration of its
terms by their conduct, their own construction is entitled to
weight in determining its proper interpretation, and many of the
used of it in support of those various rules are well established.
It is also generally accepted as authority upon the provisions.
In the view we take of this case we do not see any
reason for stressing them in an attempt to apply them to facts
as expressed in this decision.

These decisions were granted permission to operate the
plant and were required to keep it in repair and in good ex-
cess, and in addition to that, were given the right to the land
and travel of the "Brown Trust". This was the condition that
defendants were desirous of obtaining and obtaining it in their
business and in the exercise of the removal of this land and travel
they no doubt used some of the equipment on the land and travel
plant, which they had a right to do.

There does not seem to be in the contract anywhere, any
express direction that one and one travel, as was stated from the
"Brown Trust" or taken from the stock plant, and to be excluded,
leased, assigned, mortgaged, etc., before it was removed of by
defendants. In other words, it does not appear that this land
and travel was to be "true through and through" in and by the land
and travel plant" and it is not clear the intention of the par-
ties at the time the contract was made was expressed, it would
have been a simple matter to have inserted such a provision.

Defendants had the right to use all of the plant, including sand and gravel in stock piles and the sand and gravel on the "Brown Tract", but they did not obligate themselves to use it, however, they had to pay the rental price whether they used it or not. As we view this agreement, there is no limitation to what use defendants shall make of the sand and gravel excavated or used by them while in possession of this plant.

It seems clear that the defendants had the right to remove all the sand and gravel on the "Brown Tract" and could have removed it at any time during the period covered by the lease. They may have had purchasers for such sand and gravel as was removed directly from the bank sometimes called "mine run", if so, can it be said that this contract would deny them such right. We can not say it does and if they had this right to so remove sand and gravel without "running it through the plant" then they may remove it at any time during the period covered by the lease, whether that be in earlier days or in later days, just prior to expiration.

It should be observed that practically all of the cases cited by plaintiff upon the question of construction of contracts do not contain any cases involving the construction or interpretation of grants, deeds or leases. This class of instruments are generally construed most strongly against the grantor, and if any doubt or uncertainty as to the meaning of any such instruments arises, they shall be construed most strongly in favor of the grantee, or if the contract may be given two constructions, either of which is reasonable, the one most favorable to the grantee will be adopted. *Goldberg v. Pearl*, 306 Ill. 436; *Wright v. Takito*, 210 Ill. App. 58.

In the light of these decisions of our courts, the contract lease in dispute here, in our judgment, gave defendants unlimited access to the sand and gravel on the premises during the

Defendants had the right to use all of the sand and gravel on the land and gravel in stock piles and the sand and gravel on the "Brown tract", but they did not have the right to use it, however, they had to pay the rental price whatever they used it or not. As we view this agreement, there is no limitation to what use defendants shall make of the sand and gravel excavated or used by them while in possession of this tract.

It seems clear that the defendants had the right to remove all the sand and gravel on the "Brown tract" and could have removed it at any time during the period covered by the lease. They may have had purchasers for each sand and gravel as was removed directly from the bank sometimes called "mine run", if so, can it be said that this contract would deny them such right. We can not say it does and if they had this right to remove sand and gravel without "running it through the plant" then they may remove it at any time during the period covered by the lease, whether that be in earlier days or in later days, just prior to expiration.

It should be observed that practically all of the cases cited by plaintiff upon the question of construction of contracts do not contain any cases involving the construction or interpretation of grants, deeds or leases. This class of instruments are generally construed most strongly against the grantor, and if any doubt or uncertainty as to the meaning of any such instrument arises, they shall be construed most strongly in favor of the grantee, or if the contract may be given two constructions, either of which is reasonable, the one most favorable to the grantee will be adopted. *Goldberg v. Bell*, 200 Ill. 428; *Right v. Bell*, 210 Ill. 497, 501.

In the light of these decisions of our courts, the fact that lease in dispute here, in our judgment, gave defendants unlimited access to the sand and gravel on the premises during the

extent of the lease and to remove unlimited quantities and to dispose of it in such manner as they saw fit, either by running it through the plant or by selling it direct to consumer without treatment, therefore, the lease or contract should be construed to permit the defendants the right to remove and sell the gravel or sand in any form, and their use of it can not under this contract be restricted to the use only of such gravel as was taken from the pit and treated or run through the washer, separator or sieve, maintained in the sand and gravel plant for the use of such treatment.

We are of the opinion that the Court below was right in sustaining the demurrer to the declaration filed in this cause and the judgment of the Circuit Court in sustaining the demurrer and entering judgment against plaintiff should be affirmed.

Judgment affirmed.

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this case it is in such manner as they see fit, either by running
it through the place or by selling it direct to a person without
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or sand in any form, and their use of it can not under this con-
tract be restricted to the use only of such gravel as was taken
from the pit and treated or run through the washer, separator or
sieve, maintained in the sand and gravel plant for the use of
such treatment.

We are of the opinion that the Court below was right in
maintaining the demurrer to the declaration filed in this cause
and the judgment of the Circuit Court in sustaining the demurrer
and entering judgment against plaintiff should be affirmed.

Judgment affirmed.

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and thirty-_____

Clerk of the Appellate Court

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the second day of February, in
the year of our Lord one thousand nine hundred and thirty-two,
within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.

Hon. FRED G. WOLFE, Justice.

Hon. JAMES S. BALDWIN, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff. /

265 I.A. 612⁵

BE IT REMEMBERED, that afterwards, to-wit: On

FEB 18 1932 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

October Term, A.D.1931

John Franklin Brown and
Charles S. Brown, Minors,
by their mother and next
friend, Luellen Brown,
Appellants,

vs.

Appeal from Circuit Court
of LaSalle County.

Ottawa Silica Company, a
corporation,
Appellee.

BALDWIN, J.

John Franklin Brown and Charles S. Brown, minors, by mother and next friend, Luellen Brown, filed a declaration on November 25, 1929, to the January, 1930, term of the Circuit Court of LaSalle County for damages in the amount of \$10,000 against appellees for the death of their father, John Martin Brown, on the third day of December, 1927, due to silicosis incurred in the course of his employment by the Ottawa Silica Company, defendant. Each count of the declaration alleged a cause of action under the Occupational Disease Act, and also alleged that plaintiffs were minor children of John Martin Brown, of the ages of seventeen and eighteen years, respectively; that they were lineal heirs of the deceased, that by reason of his death they had been deprived of their means of support, maintenance, care and education, and that they were, before such loss of life, depend-

IN THE
COURT OF COMMONS
OF THE DISTRICT OF COLUMBIA

October Term, 1937

John Franklin Brown and
Charles B. Brown, Minors,
by their mother and next
friend, Maellen Brown,
Appellants,

Appellants from Circuit Court
of District of Columbia.

vs.

Ottawa Cattle Company, a
Corporation,
Appellee.

BALDWIN, J.

John Franklin Brown and Charles B. Brown, Minors, by
mother and next friend, Maellen Brown, filed a bill in this
Court on November 23, 1935, to the effect that, on the
Circuit Court of District of Columbia for damages in the amount
of \$10,000 against appellee for the death of their father,
John Martin Brown, on the third day of December, 1933,
and to appellee incurred in the course of his employment by
the Ottawa Cattle Company, defendant. Each count of the
declaration alleged a cause of action under the Corporation
liability act, and also alleged that plaintiffs were minor chil-
dren of John Martin Brown, at the age of seventeen and
eighteen years, respectively; that they were direct heirs of
the deceased, that by reason of his death they had been de-
prived of their estate of property, maintenance, care and edu-
cation, and that they were, before their death, dependant

ent upon deceased for support. Defendant filed a general demurrer, contending on the hearing that the declaration failed to state a good cause for action for the reason that it was not begun within one year after death, as specified by the act. The court sustained the demurrer. Plaintiffs elected to abide by their declaration, and judgment was entered against them. From said judgment plaintiffs prayed an appeal to this court.

It is the contention of the appellants;

FIRST: Appellants contend that the said declaration and each and every count thereof states a legal cause for action, and the court erred in sustaining the demurrer to the declaration of the plaintiffs.

SECOND: That the declaration is sufficient in law for the plaintiffs to maintain their action for the reason that the period of limitation in which to bring the action under the Occupational Disease Act had not expired.

THIRD: That the declaration is sufficient in law for the plaintiffs to maintain their action for the reason that the period of limitation in which the plaintiffs may bring their action had not begun to run, since the plaintiffs are minors.

Appellee contends that the declaration fails to state a cause of action for the reason it shows on its face the action was not commenced within one year from the death, as required by the act creating the right to sue.

The case at bar is founded upon a violation of the Occupational Disease Act. Illinois Revised Statutes, Smith-Hurd 1927, Chapter 48, Employment, Par. 87, Sections 1 and 15a. This act gives a separate right of action to the widow or the lineal heirs, or to any other dependents of deceased. Wilcox vs. International Harvester Co. of America, 198 App. 33, at

and upon answer the respondent. The respondent filed a counter-
statement, contending that the declaration was
failed to state a good cause for action for the reasons that it
was not begun within one year after the cause, as required by
the act. The court sustained the defendant's objection.
The court was divided by their decision, and judgment was
entered against the plaintiff. From this judgment the plaintiff has
been appealed to this court.

It is the contention of the defendant;
FIRST: That the declaration is void for lack of
and each and every count thereof states a legal cause for
action, and the court erred in sustaining the objection to
the declaration of the plaintiff.

SECOND: That the declaration is sufficient in law for
the plaintiff to maintain their action for the reason that
the period of limitation in which to bring the action under
the Occupational Disease Act has not expired.

THIRD: That the declaration is sufficient in law for the
plaintiff to maintain their action for the reason that the
period of limitation in which to bring the action has expired
and not begun to run, since the plaintiff was minor.

A police officer has been appointed to state
a cause of action for the reason it shows on its face that
action was not commenced within one year after the death, as
required by the act, and the right to sue.

The case is now being argued upon a violation of the Occu-
national Disease Act. The plaintiff's motion for judgment
1937, Chapter 20, Laws of the State of New York, and 1938,
Chapter 20, Laws of the State of New York, is now on the
final point, as to the right of action for the death of a
person. Industrial Insurance Co. of America, Inc. vs. St.

page 38. Plaintiffs are lineal heirs of deceased and also persons who were dependent for support upon deceased before his death.

Plaintiffs were of the ages of seventeen years and eighteen years at the time of the filing of the declaration. The declaration was filed one year, eleven months and twenty-three days after the death of John Martin Brown.

Section 1 of the Act provides in substance that every employer in the State engaged in carrying on any process which may produce illness or disease peculiar to the work or process on, etc. to which employees are not ordinarily exposed in other lines of employment, shall provide reasonable and approved devices, etc. for the prevention of such diseases as are thus incident to such process.

Section 15 provides in substance that for any wilful violation of the Act and death results therefrom, a right of action shall accrue to the widow, his lineal heirs or adopted children, or any person or persons dependent upon such deceased, for recovery of damages for the injury sustained by reason of the loss of life, etc: Provided, that every such action for damages in case of death, shall be commenced within one year after the death of such employee.

It is claimed that the question presented by this record has never been before any court of appellate jurisdiction in Illinois.

The cause of action under the Occupational Disease Act above referred to is one given by the Statute and was unknown to the common law, therefore, one must look to the Act itself and from it determine the rights, duties and obligations therein given or imposed.

The burden therefore is upon one suing under the act to bring himself within the requirements of the Statute and it has

page 11. Plaintiff's financial affairs of deceased and also persons who were dependent for support from deceased before his death.

Plaintiffs were of the age of seventeen years and eight years at the time of the filing of this petition. The decedent was filed one year, eleven months and twenty-three days after the death of John Martin Brown.

Section 1 of the Act provides in substance that every employer in the state engaged in carrying on any process which may produce illness or disease peculiar to the work or process on, etc. to which employees are not ordinarily exposed in other lines of employment, shall provide reasonable and approved devices, etc. for the prevention of such diseases as are then incident to such process.

Section 12 provides in substance that if any willful violation of the Act and death results therefrom, a right of action shall accrue to the widow, his financial heirs or assigned children, or any person or persons dependent upon such deceased, for recovery of damages for the injury sustained by reason of the loss of life, etc. provided, that every such action for damages in case of death, shall be commenced within one year after the death of such employee.

It is claimed that the action presented by this record has never been before any court of appellate jurisdiction in Illinois.

The cause of action under the Occupational Diseases Act above referred to is one given by the Statute and not known to the common law, therefore, one must look to the Act itself and there it defines the right, duties and obligations arising thereon or imposed.

The burden therefore is upon the plaintiff to show that being himself within the requirements of the Statute and if he

been held almost universally that a provision in the Statute creating the right, requiring an action thereon to be brought within a specified time, is more than an ordinary statute of limitations and goes to the existence of the right itself.

It is a condition attached to the right to sue at all.

(Hartray v. Chicago Railways Company 290 Ill. 85, 86) and cases cited. On page 87 the court, continuing said:

"Unlike the general Statute of Limitations, this special statute creating the right and giving the remedy does not merely confer the privilege upon the defendant to interpose a definite time limitation as a bar to the enforcement of a distinct and independent liability, but it defines and limits the existence of the right itself. In the one case the statute furnishes defendant with a technical defense to which he may resort or not, as he sees fit, while in the other it gives the plaintiff a right conditioned upon its enforcement within a definite time. Hence, while the defendant must plead the general Statute of Limitations or give notice by setting it out in a brief statement under the general issue in order to be protected by it, the reasoning that leads to that result as a matter of pleading has no application when, as in this case, the statute confers upon the plaintiff a peculiar right which, if not exercised, ceases to exist by its own limitation." (Poff v. New England Telephone and Telegraph Co. 72 N.H. 164; Martin v. Pittsburgh Railways Co. 227 Pa. 18.)

We hold therefore that for the reasons state(above the declaration did not state a good cause of action and was demurrable.

But it is claimed by Appellants that their minority (they being seventeen and eighteen years of age respectively) is sufficient in law to except them from the statutory provision and to permit them to bring the action at any time during minority. No mental or physical disability as to either of the Appellants is alleged as a reason or excuse why the suit was not started within the statutory period.

been held almost universally that a provision in the statute creating the right, regarding an action against the plaintiff within a specified time, is not an ordinary statute of limitations and does not depend on the statute itself.

It is a condition attached to the right to sue it.

(Hartley v. Chicago Railway Company 230 Ill. 40, 45) and

cases cited. On page 37 the court, citing in said:

"Unlike the general statute of limitations, this special statute creating the right and giving it no effect does not itself confer a privilege upon the defendant to introduce a definite time limitation as a bar to the enforcement of a claim and independent liability, but is a condition and limits the exercise of the right itself. In the one case the statute creates a liability with a special defense to which he may resort or not, as he sees fit, while in the other it gives the plaintiff a right conditioned upon its enforcement within a definite time. Hence, while the defendant must plead the general statute of limitations or give notice by setting it out in a brief statement under the general issue in order to be protected by it, the plaintiff leads to that to lit as a matter of pleading has no application when, as in this case, the statute concerns only the plaintiff's special right which, if not exercised, ceases to exist by its own limitation." (Pell v. New England Telephone and Telegraph Co. 163 N.H. 104; Martin v. Massachusetts Ways Co. 237 N.H. 18.)

We hold therefore that for the reasons stated above the

decision did not state a good cause of action and was

demurrable.

But it is claimed by Appellants that their minority (they

being seventeen and fifteen years of age respectively) is

sufficient in law to exempt them from the statutory provision

and to permit them to bring the action at any time during minority.

It would be difficult to find any authority to the contrary.

It is alleged on a motion for reversal that the writ was not started

within the statutory period.

Courts carefully guard the rights of minors and they should not be precluded from enforcing their rights, unless clearly and unmistakably they are debarred by the statute.

The statute under discussion contains no express exceptions as to those who may come within its terms.

Several cases are cited in the briefs of Appellants and upon which they rely for reversal; but some of them deal generally with limitations with respect to minors and, in our opinion, do not bear upon this question.

Reliance for reversal is placed upon the case of McDonald vs. Spring Valley 285 Ill. 52, which perhaps is a leading case and upon which other cited cases are predicated. That case held that a minor seven years of age and mentally and physically incompetent was not required to give notice to the city within six months as required by the statute.

In such suits the basis of the action is the common law action for negligence and the right to sue did not depend upon the statute. The action in the instance case is purely statutory and unknown to the common law.

The child in the McDonald case was seven years of age and alleged to be mentally and physically incompetent, while in this case the minors are alleged to be seventeen and eighteen years of age respectively and no allegation as to physical or mental incompetency, relying solely upon the fact that they are minors.

A child seven years of age cannot be guilty of contributory negligence, and at common law such a child is presumed to be incapable of committing a crime.

Minors of the ages of the appellants, at least presumptively, can be guilty of contributory negligence and they can commit crime and be punished therefor under the law.

It seems, from a careful reading of the McDonald case, that the court did not intend to include all minors, even in such cases.

On this question the Court in that case said on page 56

"Common experience tells us that the cases in which the exception to this statute would be applied are very few, and that in a great majority of cases there is not such disability as would make compliance with the statute impossible. It would be unreasonable to so construe this statute as to make it appear that the legislature intended in these few cases to require that to be done which is utterly impossible of performance."

We think no general exception of the Occupational Disease Act in favor of minors, as such, can be predicated upon by the decision in the McDonald case, nor, in our judgment, did it so establish a general exception for minors under the act there under consideration.

In Sobieski vs. City 234 Ill. App. 382 the plaintiff was eleven months old at the time of the accident; in Brownell vs. Village 215 Ill. App. 404 the plaintiff was under five years of age. In Doerr vs. City 239 Ill. App. 560 the child was eleven years of age, but it was alleged that due to inexperience and his physical and mental condition, resulting from the accident he was unable to give the notice provided by the statute.

These cases are relied upon by appellants and all have to do with the six months notice to cities after the occurrence of the accident and for the reasons above stated are distinguishable from the instant case.

Walgreen Company vs. Industrial Commission 323 Ill. 194 arising under the Compensation Act does not apply here for the reason that that Act expressly excepted "incompetent employee" from the running of the statute, the injured person in that case being an employee, who was also a minor.

It seems, from a careful reading of the McDonald case, that the court did not intend to include all minors, even in such cases.

In this connection the court in that case said on

page 56

"Common experience tells us that the cases in which the exception to this statute would be applied are very few, and that in a great majority of cases there is not such disability as would make compliance with the statute impossible. It would be unreasonable to require this statute to be made it a part of the legislative intent in these few cases to require that to be done which is utterly impossible of performance."

I think no general exception of the statute will

be set in favor of minors, as such, can be predicated upon by the decision in the McDonald case, nor, in our judgment, did it establish a general exception for minors under the act there under consideration.

In *Sobieski vs. City*, 24 Ill. App. 322 the plaintiff

was eleven months old at the time of the accident; in *Brownell vs. Village*, 215 Ill. App. 404 the plaintiff was under five years of age. In *Boern vs. City*, 229 Ill. App. 320 the child was eleven years of age, but it was alleged that due to inexperience and his physical and mental condition, resulting from the accident he was unable to give the notice provided by the statute.

These cases are relied upon by appellants and all have

to do with the six months notice to cities after the occurrence of the accident and the reasons above stated are distinguishable from the instant case.

Algreen & Son vs. Industrial Commission, 235 Ill.

124 arising under the Compensation Act does not apply here for the reason that that Act expressly excepted "independent employees" from the running of the statute, the injured person in that case being an employee, and was also a minor.

We are of the opinion that from a study of the Act itself and of the decided cases in our courts upon the question here under discussion the Court below properly sustained the demurrer to the declaration and its action in that respect is hereby affirmed.

Affirmed.

The view of the opinion that from a study of the fact
itself and of the decided cases in our courts upon the question
here under discussion the Court below properly sustained the
denial to the declaration and its action in that respect is
hereby affirmed.

Affirmed.

STATE OF ILLINOIS.

SECOND DISTRICT

} ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and thirty-_____

Clerk of the Appellate Court

13 7
AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the second day of February, in the year of our Lord one thousand nine hundred and thirty-two, within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.

Hon. FRED G. WOLFE, Justice.

Hon. JAMES S. BALDWIN, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff. /

265 I.A. 613²

BE IT REMEMBERED, that afterwards, to-wit: On

FEB 18 1932 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

In the Appellate Court of Illinois

Second District

October Term, A.D. 1931

Charles J. O'Neil, and Eugene

T. O'Neil, partners doing business

as O'Neil Bros.,

appellants,

vs.

Louis Salzman,

appellee,

Appeal from the Circuit Court

of Kankakee County

BALDWIN, J:

This is an appeal from the Circuit Court of Kankakee County from a judgment for defendant in a suit brought by appellants on a note given them by appellee dated September 12, 1928, for the sum of \$340.00, due three months after date with interest.

There was a cognovit attached to said note and appellants placed the note in judgment for the sum of \$374.00 and costs. After the judgment was opened up appellee filed a plea of general issue and also two special pleas, one alleging that the note, together with a Ford automobile were given as a purchase price of a tractor and plow, which appellee purchased from appellant. The second plea alleged that the tractor was expressly warranted to him by appellants and as such warranty was false and that appellee relied upon said warranty.

A trial was had and the verdict of the jury was for the appellee.

Some question as to the sufficiency of the pleas is raised in this record, but not in a proper way as it was not raised at the time of the trial, and therefore, is considered waived and the error, if any, is cured by verdict. Devine v. Chicago City

In the Supreme Court of Illinois

Between

October Term, 1931

Charles J. O'Neill, and Eugene

T. O'Neill, partners doing business

as O'Neill Bros.,

appellants,

Appeal from the Circuit Court

vs.

of Lawrence County

Louis Salzman,

appellee,

BALDWIN, J.

This is an appeal from the Circuit Court of Lawrence

County from a judgment for defendant in a suit brought by

appellants on a note given them by appellee dated September 12,

1928, for the sum of \$340.00, due three months after date with

interest.

There was a cognovit attached to said note and appellants

placed the note in judgment for the sum of \$374.00 and costs.

After the judgment was entered up appellee filed a plea of general

issue and also two special pleas, one alleging that the note, together

with a Ford automobile were given in a purchase price of a tractor

and plow, which appellee purchased from appellant. The second plea

alleged that the tractor was expressly warranted to him by appellants

and as such warranty was false and that appellee relied upon said

warranty.

A trial was had and the verdict of the jury was for the

appellee.

Some question as to the sufficiency of the plea is raised

in this record, but not in a proper way as it was not raised at

the time of the trial, and therefore, is considered waived and

the error, if any, is cured by verdict. Devine v. Chicago City

Railway Company, 237 Ill. 278.

It seems that a motion for an instructed verdict for the plaintiff was made in the trial court at the proper time and it was not in writing.

The abstract does not seem to set forth the nature of this motion or the instruction which ^{should} have accompanied it and, as it does not appear in the abstract, the same is not considered. Gibler vs. City of Mattoon, 167 Ill. 18.

On the trial plaintiff offered the note and rested. Defendant's evidence was that the note was given for part payment of the tractor formerly owned by a man named Langlois. Appellee traded a Ford automobile, together with the note for the tractor and a plow. On or about September 12, 1928, appellee called on appellants and told them he wanted a used tractor and after showing him several, one that was standing in the shed was shown him and appellants said that the tractor was in perfect working condition. Appellee said, I will take your word for it, as he was not in a position to examine it at that time and appellant further said to him, "You won't go wrong on that tractor, it is absolutely all right, never done a thing to it, didn't need anything done to it." And again he said at another time, "It is absolutely all right, " and appellee said, "I am taking your word for it." Appellee then drove the tractor home and it rained enroute so he left the tractor in a field and the next morning returned to it and found that the water jacket was cracked. The crack was smeared up with water and oil and was not readily noticeable. Appellee tried to use the tractor and tried to have it repaired, but found that he could not do so and he attempted to return the tractor ~~to~~ to the home of appellee, but could not get in and left it with a neighbor and informed appellants of that fact. Several other witnesses were called for appellee in

Railway Company, 207 Ill. 275.

It seems that a motion for an instructed verdict for the plaintiff was made in the trial court at the proper time and it was not in writing.

The abstract does not seem to set out the nature of this motion or the instruction which have accompanied it and, as it does not appear in the abstract, the same is not a matter-
ed. *Diller vs. City of Watson*, 167 Ill. 18.

On the trial plaintiff offered the note and testified that the note was given for part payment of the tractor formerly owned by a man named Langlois. Appellee testified a Ford automobile, together with the note for the tractor and a plow. On or about September 12, 1928, appellee called on appellee and told him he wanted a used tractor and after showing him several, one that was standing in the yard was shown him and appellee said that the tractor was in perfect working condition. Appellee said, "I will take your word for it, as he was not in a position to examine it at that time and appellee further said to him, 'You won't go wrong on that tractor, it is absolutely all right, never done a thing to it, didn't need anything done to it.' And appellee said at another time, 'It is absolutely all right,' and appellee said, 'I am taking your word for it.' Appellee then drove the tractor home and it turned over so he left the tractor in a field and the next morning returned to it and found that the water jacket was cracked. The crank was covered up with water and oil and was not readily noticeable. Appellee tried to use the tractor and tried to have it repaired, but found that he could not do so and he attempted to return the tractor to the name of appellee but could not get in and left it with a neighbor and informed appellee of that fact. Several other witnesses were called for appellee in

corroboration of his theory of the case and some witnesses were called in rebuttal by appellants, denying the principal facts.

So far as the record discloses, ample opportunity was afforded by the trial court to both sides of this controversy to produce and introduce evidence in support of their contentions and a jury heard the evidence and rendered a verdict for the defendant.

We have read the record carefully, there being no serious question of law involved, and have come to the conclusion that it was wholly a question of fact upon which the credibility of witnesses before the jury may have played a part. At any rate, it seems to us without doubt that the trial was fairly conducted and a verdict of the jury was rendered upon disputed questions of fact and we cannot say but that the jury had the right to render such a verdict. We, therefore, affirm the judgment below.

Affirmed.

corroboration of his story of the rape and the witness
were called in a batch by appellants, besides the material
facts.

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case, it seems to us without doubt that the trial was fairly
conducted and a verdict of the jury was rendered upon disputed
questions of fact and we cannot say but that the jury had the
right to render such a verdict. We, therefore, affirm the
judgment below.

affirmed.

STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and

for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby
certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause,
of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said
Appellate Court, at Ottawa, this _____ day of
_____ in the year of our Lord one thousand nine
hundred and thirty-_____

Clerk of the Appellate Court

147
AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday the second day of February, in the year of our Lord one thousand nine hundred and thirty-two, within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.

Hon. FRED G. WOLFE, Justice.

Hon. JAMES S. BALDWIN, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

265 I.A. 613²

BE IT REMEMBERED, that afterwards, to-wit: On

FEB 11 1932
the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

CARLO BARTOLUCCI,

Appellee

-vs-

FORT DEARBORN INSURANCE
COMPANY,

Appellant

)
Appeal from the
Circuit Court of
Winnebago County.
)

Baldwin, J.

This is a suit on an insurance policy. Bartolucci, the appellee, owned an automobile on which he carried accident insurance in the defendant insurance company. Appellee had an accident to his car and it was damaged. He demanded the amount of his damage from the insurance company and they refused to pay. Suit was brought in the Circuit Court of Winnebago County and appellee recovered a judgment for \$325.26 and costs of suit.

At the trial of the case plaintiff introduced evidence to show he was the owner of the car; that he carried a policy of insurance with defendant company; that he had paid the premium on the policy of insurance; that he had had an accident with his car; that he took his car to a regular garage to have it repaired; that they rendered him a bill for the amount of the repairs and that he paid this amount. He introduced the policy of insurance in evidence and rested his case.

The defendant insurance company, do not contend that they are not liable under the policy of insurance, but only contest the amount of the bill and claim that the evidence of plaintiff did not properly establish the amount of damage that the jury by their verdict found for the plaintiff.

The defendant insurance company introduced evidence to show that in the witnesses' opinion the amount charged by the garage was excessive and that the block of the engine was

Appeal from the	Appellee	CARLO MARCONI
Circuit Court of	-vs-	
Winnebago County.		FORT DEARBORN INSURANCE
		COMPANY,
	Appellant	

Salisbury, J.

This is a suit on an insurance policy. Marconi, the appellee, owned an automobile on which he carried accident insurance in the defendant insurance company. Appellee had an accident to his car and it was damaged. He demanded the amount of his damage from the insurance company and they refused to pay. Suit was brought in the Circuit Court of Winnebago County and appellee recovered a judgment for \$25.00 and costs of suit.

At the trial of the case plaintiff introduced evidence to show he was the owner of the car; that he carried a policy of insurance with defendant company; that he had paid the premium on the policy of insurance; that he had had an accident with his car; that he took his car to a regular garage to have it repaired; that they rendered him a bill for the amount of the repairs and that he paid this amount. He introduced the policy of insurance in evidence and tested his case.

The defendant insurance company, do not contend that they are not liable under the policy of insurance, but only contend the amount of the bill and claim that the evidence of plaintiff did not properly establish the amount of damage that the jury by their verdict found for the plaintiff.

The defendant insurance company introduced evidence to show that in the witness opinion the amount offered by the garage was excessive and that the bill of the garage was

cracked and had been welded. Some witness testified that in his opinion it was caused by freezing.

In rebuttal the plaintiff in the original suit put in evidence to show that the crack was a fresh crack and in the opinion of the mechanic it was caused by the impact at the time of the accident. He also showed that the garage that repaired his car was a reputable and public garage.

It has been repeatedly held that a receipted bill for repairs to an automobile, if there is no evidence to show that there is any collusion or that the garage people are not reputable business people, that that is evidence to be considered by the jury as being the ordinary and reasonable amount for the repairs. In this case it was a question of fact for the jury to decide whether they would take this receipted bill as being the amount of the damage to the plaintiff or whether they would believe the witnesses for the defendant insurance company. Darling and Co., vs. Yellow Cab Co., 238 Ill. App. 326 at 329; Sunbeam Beverage Co., vs. Cunningham 242 Ill. App. 401 at 403.

Appellant contends that given instruction number two for appellee should not have been given and that two instructions he offered, which were refused, should have been given.

The first refused instruction was properly refused because of the word "nearly" and the second instruction was properly refused because it was covered by other instructions.

The first instruction given for plaintiff, to which exception is taken by appellant, is technically not in proper form, but in our opinion it did not mislead the jury in view of appellant's given instruction number five, which stated the true rule.

In our opinion, as stated above, the jury heard the witnesses and were not misled, the instructions on the whole being correct instructions and, therefore, holding the view that we do, the judgment of the court below is hereby affirmed.

Affirmed.

cracked and had been welded. Same witness testified that in his opinion it was caused by lightning.

In rebuttal the plaintiff in the original suit put in evidence to show that the error was a known one and in the opinion of the mechanic it was caused by the layout of the time of the accident. He also showed that the engine that he had at car was a reputable and reliable engine.

It has been repeatedly held that a jury will not be required to an automobile, if there is no evidence to show that there is any collusion or that the engine would not be reputable business people, that the evidence to be considered by the jury as being the ordinary and reasonable amount for the repairs. In this case it was a question of fact for the jury to decide whether they would take the repairs as being the amount of the damage to the plaintiff or whether they would believe the witnesses for the defendant insurance company.

Barling and Co., vs. Yellow Cab Co., 232 Ill. App. 322 at 323; Southern Beverage Co., vs. Cunningham 242 Ill. App. 401 at 403.

Appellant contends that given instruction number two for appellee should not have been given and that two instructions be offered, which were refused, should have been given.

The first refused instruction was properly refused because of the word "shall" and the second instruction was properly refused because it was covered by other instructions.

The first instruction given for plaintiff, to which exception is taken by appellant, is technically not in proper form, but in our opinion it did not affect the jury in view of appellant's given instruction number five, which stated the true rule.

In our opinion, as stated above, the jury need the witnesses and were not misled, the instructions on the whole being correct instructions and, therefore, upholding the view that we do.

The judgment of the court below is hereby affirmed.

STATE OF ILLINOIS.

SECOND DISTRICT

} ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and thirty-_____

Clerk of the Appellate Court

15 7
AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the second day of February, in the year of our Lord one thousand nine hundred and thirty-two, within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.

Hon. FRED G. WOLFE, Justice.

Hon. JAMES S. BALDWIN, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff. /

265 I.A. 613³

BE IT REMEMBERED, that afterwards, to-wit: On

FFB 18002 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

LOUIS GOESSWEIN,

Appellee

-vs-

GEORGE JOCHEM, MARY DOUBET
CASSELL, and EARL B. WILLIAMSON

Appellants.

Appeal from County Court
of Peoria County.

Baldwin, J.

On January 23, 1930, the appellee, Louis Goesswein, obtained a judgment in the County Court of Peoria County against one of the appellants, George Jochem, in Assumpsit, for the sum of \$430.82, and costs of suit. Jochem prayed for, and was allowed an appeal to this ~~xx~~ court upon his filing an Appeal Bond in the sum of \$1,000.00, with Sureties, to be approved by the Court. Jochem did not perfect his appeal by filing an authenticated copy of the Record in the Office of the Clerk of this Court within the time prescribed by law, and accordingly, on motion of the appellee Goesswein, said cause was docketed in this Court as No. 8239, and on July 24, 1930, said appeal was dismissed by order of this Court and a judgment was rendered against the appellant Jochem by this Court for \$45.00 damages, and costs of suit, and an execution was issued to the Sheriff of Peoria County for the collection of these damages and costs, which was satisfied by the appellant Jochem during the life of said Appellate Court execution.

On July 28, 1930, at the request of the appellee Goesswein, there was issued out of the Office of the Clerk of said County Court, an execution against the appellant Jochem on said judgment so rendered on January 23, 1930, for the sum of \$430.82, and \$11.40, costs of suit. On August 23, 1930, the Sheriff of Peoria County personally served said execution on the appellant George Jochem and demanded payment thereof. The Sheriff of Peoria County, not being able to collect said execution during the

Amesbury County Court
of New Brunswick

LOUIS GOOSEWEIN,
Appellee
-vs-
GEORGE JOHNSON, MARY DOWNTON
CASSIDY, and EARL E. WILLIAMSON
Appellants.

Baldwin, J.

On January 22, 1920, the appellee, Louis Goosewein, obtained a judgment in the County Court of Peoria County against one of the appellants, George Johnson, in Assumpsit, for the sum of \$430.82, and costs of suit. Johnson prayed for, and was allowed an appeal to this court upon his filing an Appeal Bond in the sum of \$1,000.00, with Sureties, to be approved by the Court. Johnson did not perfect his appeal by filing an authenticated copy of the Record in the Office of the Clerk of this Court within the time prescribed by law, and accordingly, an action of the appellee Goosewein, said cause was docketed in this Court as No. 8232, and on July 24, 1920, said cause was dismissed by order of this Court and a judgment was rendered against the appellant Johnson by this Court for \$48.00 damages, and costs of suit, and an execution was issued to the Sheriff of Peoria County for the collection of these damages and costs, which was satisfied by the appellant Johnson during the life of said Appellate Court execution.

On July 22, 1920, at the request of the appellee Goosewein, there was issued out of the Office of the Clerk of said County Court, an execution against the appellant Johnson in said judgment as rendered on January 22, 1920, for the sum of \$430.82, and \$11.40, costs of suit. On August 23, 1920, the Sheriff of Peoria County personally served said execution on the appellant George Johnson and demanded payment thereof. The Sheriff of Peoria County, not being able to collect said execution, returned the

life thereof, returned it: "No part satisfied. No property found," on the 25th day of October, 1930.

The appellee Goesswein, finding himself unable to collect his said judgment against Jochem by Execution, on January 14, 1931, brought suit in the County Court of Peoria County in debt against the appellants herein, George Jochem, Mary Doubet Cassell and Earl B. Williamson, on the said Appeal Bond for the sum of \$1000.00, dated January 23, 1930. The declaration consisted of one special count setting up the terms and conditions of the Bond fully. In the condition of the Bond is the following:

"Now if the said George J. Jochem shall duly prosecute said appeal, and shall moreover pay the amount of the judgment, costs, interest and damages, rendered and to be rendered against him, the said George J. Jochem, in case the said judgment shall be affirmed in the said Appellate Court, then the above obligation to be null and void, otherwise to remain in force and virtue."

The declaration also alleges that at the May Term, A.D. 1930, of the said Appellate Court, Second District, to-wit, on the 25th day of June, A.D. 1930, at Ottawa, in said State, by the consideration of said Appellate Court, the said appeal was dismissed for failure to file in the Office of the Clerk of said Appellate Court, as required by law, an authenticated copy of the record of said judgment in said writing obligatory mentioned, which said dismissal of said appeal by said Court amounted to an affirmance of said judgment for the purposes of this action. Attached to the declaration is a copy of the Bond, affidavit of claim, showing the amount due \$463.96, and a Bill of Particulars showing the amount sued for, as follows:

Amount of judgment.....	\$430.82
Interest.....	20.34
Court cost (County Court)....	<u>12.80</u>
Total.....	\$463.96

The appellants first filed a demurrer to the declaration which was overruled by the Court (Ab. Page 1). The appellants then filed three pleas, to which the appellee filed a demurrer, which was sustained by the Court, (Ab. Page 2). The

From, in the 19th July 1900, 1900.

JOSEPH OF ARIMS LACONTE, ALLEGEDLY KILLED BY 91

4. Younger than 18 years of age

1931, 1932, 1933, 1934, 1935, 1936, 1937, 1938, 1939, 1940, 1941, 1942, 1943, 1944, 1945, 1946, 1947, 1948, 1949, 1950, 1951, 1952, 1953, 1954, 1955, 1956, 1957, 1958, 1959, 1960, 1961, 1962, 1963, 1964, 1965, 1966, 1967, 1968, 1969, 1970, 1971, 1972, 1973, 1974, 1975, 1976, 1977, 1978, 1979, 1980, 1981, 1982, 1983, 1984, 1985, 1986, 1987, 1988, 1989, 1990, 1991, 1992, 1993, 1994, 1995, 1996, 1997, 1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 2180, 2181, 2182, 2183, 2184, 2185, 2186, 2187, 2188, 2189, 2190, 2191, 2192, 2193, 2194, 2195, 2196, 2197, 2198, 2199, 2200, 2201, 2202, 2203, 2204, 2205, 2206, 2207, 2208, 2209, 2210, 2211, 2212, 2213, 2214, 2215, 2216, 2217, 2218, 2219, 2220, 2221, 2222, 2223, 2224, 2225, 2226, 2227, 2228, 2229, 2230, 2231, 2232, 2233, 2234, 2235, 2236, 2237, 2238, 2239, 2240, 2241, 2242, 2243, 2244, 2245, 2246, 2247, 2248, 2249, 2250, 2251, 2252, 2253, 2254, 2255, 2256, 2257, 2258, 2259, 2260, 2261, 2262, 2263, 2264, 2265, 2266, 2267, 2268, 2269, 2270, 2271, 2272, 2273, 2274, 2275, 2276, 2277, 2278, 2279, 2280, 2281, 2282, 2283, 2284, 2285, 2286, 2287, 2288, 2289, 2290, 2291, 2292, 2293, 2294, 2295, 2296, 2297, 2298, 2299, 2300, 2301, 2302, 2303, 2304, 2305, 2306, 2307, 2308, 2309, 2310, 2311, 2312, 2313, 2314, 2315, 2316, 2317, 2318, 2319, 2320, 2321, 2322, 2323, 2324, 2325, 2326, 2327, 2328, 2329, 2330, 2331, 2332, 2333, 2334, 2335, 2336, 2337, 2338, 2339, 2340, 2341, 2342, 2343, 2344, 2345, 2346, 2347, 2348, 2349, 2350, 2351, 2352, 2353, 2354, 2355, 2356, 2357, 2358, 2359, 2360, 2361, 2362, 2363, 2364, 2365, 2366, 2367, 2368, 2369, 2370, 2371, 2372, 2373, 2374, 2375, 2376, 2377, 2378, 2379, 2380, 2381, 2382, 2383, 2384, 2385, 2386, 2387, 2388, 2389, 2390, 2391, 2392, 2393, 2394, 2395, 2396, 2397, 2398, 2399, 2400, 2401, 2402, 2403, 2404, 2405, 2406, 2407, 2408, 2409, 2410, 2411, 2412, 2413, 2414, 2415, 2416, 2417, 2418, 2419, 2420, 2421, 2422, 2423, 2424, 2425, 2426, 2427, 2428, 2429, 2430, 2431, 2432, 2433, 2434, 2435, 2436, 2437, 2438, 2439, 2440, 2441, 2442, 2443, 2444, 2445, 2446, 2447, 2448, 2449, 2450, 2451, 2452, 2453, 2454, 2455, 2456, 2457, 2458, 2459, 2460, 2461, 2462, 2463, 2464, 2465, 2466, 2467, 2468, 2469, 2470, 2471, 2472, 2473, 2474, 2475, 2476, 2477, 2478, 2479, 2480, 2481, 2482, 2483, 2484, 2485, 2486, 2487, 2488, 2489, 2490, 2491, 2492, 2493, 2494, 2495, 2496, 2497, 2498, 2499, 2500, 2501, 2502, 2503, 2504, 2505, 2506, 2507, 2508, 2509, 2510, 2511, 2512, 2513, 2514, 2515, 2516, 2517, 2518, 2519, 2520, 2521, 2522, 2523, 2524, 2525, 2526, 2527, 2528, 2529, 2530, 2531, 2532, 2533, 2534, 2535, 2536, 2537, 2538, 2539, 2540, 2541, 2542, 2543, 2544, 2545, 2546, 2547, 2548, 2549, 2550, 2551, 2552, 2553, 2554, 2555, 2556, 2557, 2558, 2559, 2560, 2561, 2562, 2563, 2564, 2565, 2566, 2567, 2568, 2569, 2570, 2571, 2572, 2573, 2574, 2575, 2576, 2577, 2578, 2579, 2580, 2581, 2582, 2583, 2584, 2585, 2586, 2587, 2588, 2589, 2590, 2591, 2592, 2593, 2594, 2595, 2596, 2597, 2598, 2599, 2600, 2601, 2602, 2603, 2604, 2605, 2606, 2607, 2608, 2609, 2610, 2611, 2612, 26

Against the original version, George Jones, New Yorker (1961)

to me, but not back toward him and on, possibly, a few more

To determine whether the .CFFP, .P2, .P3, .P4, .P5, .P6, .P7, .P8, .P9, .P10, .P11, .P12, .P13, .P14, .P15, .P16, .P17, .P18, .P19, .P20, .P21, .P22, .P23, .P24, .P25, .P26, .P27, .P28, .P29, .P30, .P31, .P32, .P33, .P34, .P35, .P36, .P37, .P38, .P39, .P40, .P41, .P42, .P43, .P44, .P45, .P46, .P47, .P48, .P49, .P50, .P51, .P52, .P53, .P54, .P55, .P56, .P57, .P58, .P59, .P60, .P61, .P62, .P63, .P64, .P65, .P66, .P67, .P68, .P69, .P70, .P71, .P72, .P73, .P74, .P75, .P76, .P77, .P78, .P79, .P80, .P81, .P82, .P83, .P84, .P85, .P86, .P87, .P88, .P89, .P90, .P91, .P92, .P93, .P94, .P95, .P96, .P97, .P98, .P99, .P100, .P101, .P102, .P103, .P104, .P105, .P106, .P107, .P108, .P109, .P110, .P111, .P112, .P113, .P114, .P115, .P116, .P117, .P118, .P119, .P120, .P121, .P122, .P123, .P124, .P125, .P126, .P127, .P128, .P129, .P130, .P131, .P132, .P133, .P134, .P135, .P136, .P137, .P138, .P139, .P140, .P141, .P142, .P143, .P144, .P145, .P146, .P147, .P148, .P149, .P150, .P151, .P152, .P153, .P154, .P155, .P156, .P157, .P158, .P159, .P160, .P161, .P162, .P163, .P164, .P165, .P166, .P167, .P168, .P169, .P170, .P171, .P172, .P173, .P174, .P175, .P176, .P177, .P178, .P179, .P180, .P181, .P182, .P183, .P184, .P185, .P186, .P187, .P188, .P189, .P190, .P191, .P192, .P193, .P194, .P195, .P196, .P197, .P198, .P199, .P200, .P201, .P202, .P203, .P204, .P205, .P206, .P207, .P208, .P209, .P210, .P211, .P212, .P213, .P214, .P215, .P216, .P217, .P218, .P219, .P220, .P221, .P222, .P223, .P224, .P225, .P226, .P227, .P228, .P229, .P230, .P231, .P232, .P233, .P234, .P235, .P236, .P237, .P238, .P239, .P240, .P241, .P242, .P243, .P244, .P245, .P246, .P247, .P248, .P249, .P250, .P251, .P252, .P253, .P254, .P255, .P256, .P257, .P258, .P259, .P260, .P261, .P262, .P263, .P264, .P265, .P266, .P267, .P268, .P269, .P270, .P271, .P272, .P273, .P274, .P275, .P276, .P277, .P278, .P279, .P280, .P281, .P282, .P283, .P284, .P285, .P286, .P287, .P288, .P289, .P290, .P291, .P292, .P293, .P294, .P295, .P296, .P297, .P298, .P299, .P300, .P301, .P302, .P303, .P304, .P305, .P306, .P307, .P308, .P309, .P310, .P311, .P312, .P313, .P314, .P315, .P316, .P317, .P318, .P319, .P320, .P321, .P322, .P323, .P324, .P325, .P326, .P327, .P328, .P329, .P330, .P331, .P332, .P333, .P334, .P335, .P336, .P337, .P338, .P339, .P340, .P341, .P342, .P343, .P344, .P345, .P346, .P347, .P348, .P349, .P350, .P351, .P352, .P353, .P354, .P355, .P356, .P357, .P358, .P359, .P360, .P361, .P362, .P363, .P364, .P365, .P366, .P367, .P368, .P369, .P370, .P371, .P372, .P373, .P374, .P375, .P376, .P377, .P378, .P379, .P380, .P381, .P382, .P383, .P384, .P385, .P386, .P387, .P388, .P389, .P390, .P391, .P392, .P393, .P394, .P395, .P396, .P397, .P398, .P399, .P400, .P401, .P402, .P403, .P404, .P405, .P406, .P407, .P408, .P409, .P410, .P411, .P412, .P413, .P414, .P415, .P416, .P417, .P418, .P419, .P420, .P421, .P422, .P423, .P424, .P425, .P426, .P427, .P428, .P429, .P430, .P431, .P432, .P433, .P434, .P435, .P436, .P437, .P438, .P439, .P440, .P441, .P442, .P443, .P444, .P445, .P446, .P447, .P448, .P449, .P450, .P451, .P452, .P453, .P454, .P455, .P456, .P457, .P458, .P459, .P460, .P461, .P462, .P463, .P464, .P465, .P466, .P467, .P468, .P469, .P470, .P471, .P472, .P473, .P474, .P475, .P476, .P477, .P478, .P479, .P480, .P481, .P482, .P483, .P484, .P485, .P486, .P487, .P488, .P489, .P490, .P491, .P492, .P493, .P494, .P495, .P496, .P497, .P498, .P499, .P500, .P501, .P502, .P503, .P504, .P505, .P506, .P507, .P508, .P509, .P510, .P511, .P512, .P513, .P514, .P515, .P516, .P517, .P518, .P519, .P520, .P521, .P522, .P523, .P524, .P525, .P526, .P527, .P528, .P529, .P530, .P531, .P532, .P533, .P534, .P535, .P536, .P537, .P538, .P539, .P540, .P541, .P542, .P543, .P544, .P545, .P546, .P547, .P548, .P549, .P550, .P551, .P552, .P553, .P554, .P555, .P556, .P557, .P558, .P559, .P560, .P561, .P562, .P563, .P564, .P565, .P566, .P567, .P568, .P569, .P570, .P571, .P572, .P573, .P574, .P575, .P576, .P577, .P578, .P579, .P580, .P581, .P582, .P583, .P584, .P585, .P586, .P587, .P588, .P589, .P590, .P591, .P592, .P593, .P594, .P595, .P596, .P597, .P598, .P599, .P600, .P601, .P602, .P603, .P604, .P605, .P606, .P607, .P608, .P609, .P610, .P611, .P612, .P613, .P614, .P615, .P616, .P617, .P618, .P619, .P620, .P621, .P622, .P623, .P624, .P625, .P626, .P627, .P628, .P629, .P630, .P631, .P632, .P633, .P634, .P635, .P636, .P637, .P638, .P639, .P640, .P641, .P642, .P643, .P644, .P645, .P646, .P647, .P648, .P649, .P650, .P651, .P652, .P653, .P654, .P655, .P656, .P657, .P658, .P659, .P660, .P661, .P662, .P663, .P664, .P665, .P666, .P667, .P668, .P669, .P670, .P671, .P672, .P673, .P674, .P675, .P676, .P677, .P678, .P679, .P680, .P681, .P682, .P683, .P684, .P685, .P686, .P687, .P688, .P689, .P690, .P691, .P692, .P693, .P694, .P695, .P696, .P697, .P698, .P699, .P70

It is difficult to say what our future does indeed are

...in the condition of the road to the ...

"And if the said J. J. Jones shall be rendered against him, the said J. J. Jones, in case the said judgment shall be rendered in the said Appellate Court, then the above obligation to be null and void, operative to remain in force and virtue."

The declaration also alleges that on the 1st day of April, A.D. 1941, the defendant did not appear in court.

1930, at the said appellate Court, second sheet, 10-11

on the 25th day of June, A.D. 1930, at Detroit, in said State,

by the consideration of said journals and the said answer

was discussed and it was decided that the following should be done:

had obtained no, and of course no, time stated him to

proteins of the cell and the cell to be used for the purpose of the study.

mentioned, which said otherwise.

amounted to an alliance of kindred interests for the purpose of

This action. Attached to the petition is a copy of the Bond.

Attachment of client, showing the amount due

of Particular to also in the same way for, as follows:

35.374 4th 1000 ft 9- 10-1902

48.00 500,000

DE.10 (dano v. 100) dano dano

No. 604

The applicant's file is being reviewed by the Department of the Interior.

which was overruled by the Court (No. 10000).

then filled three more.

which was sustained by the Court. (p. 100-101). The

appellants then filed seven amended pleas which are fully abstracted, commencing in Abstract on page two. To these pleas the appellee filed a general and special demurrer (said demurrer is not abstracted), which demurrer was sustained to all said pleas. The appellants elected to abide by their pleas, and after hearing before the Court, the Court found the appellee's debt to be \$1,000.00, and assessed the appellee's damages at \$463.96, and costs of suit, and adjudged that said debt be discharged upon payment of said damages and costs, from which judgment the appellants prayed for, and were allowed, this appeal.

Appellants in their argument have not insisted that their pleas numbered 1 (nil debet), 2 (general performance) and 4 (non damnificatus) set up a good defense to the appellee's cause of action as alleged in the declaration, but they insist that their pleas, numbered 3, 5, 6 and 7, setting up that the judgment of the Appellate Court dismissing the appeal did not constitute a breach of the Bond, and that they have paid the damages, amounting to \$45.00, and costs, in the Appellate Court, set up good defenses.

The demurrer was both general and special. The special demurrer to these pleas which appellants have not seen fit to abstract is as follows:

"THIRD PLEA:

(a) Said plea is a plea of special performance, showing the payment of \$45.00 and court costs, but does not alleged that the defendants have paid the judgment of the County Court, amounting to \$430.82, or the court costs, or interest on said judgment.

(b) Said plea purports to be an answer to the plaintiff's whole cause of action, but answers none of it.

(c) Said plea is the same in substance as defendant's third plea, filed February 16, 1931, in which a demurrer has already been sustained by the Court.

"FIFTH PLEA:

(a) Said plea alleges that the judgment of the County Court has not been affirmed, but alleges facts which show that the dismissal of the appeal amounted to a regular technical affirmance of the judgment and does not answer any of the plaintiff's cause of action.

appellants then filed seven amended pleas which are filed as-
sented, commencing in Abstract on page two. To these pleas
the appellee filed a general and special demurrer (said demurrer
is not attached), which demurrers are sustained to all said
pleas. The appellants elected to abide by their pleas, and
after hearing before the Court, the Court found the appellee's
right to be \$1,000.00, and awarded the appellee's damages at
\$483.98, and costs of suit, and adjudged that said debt be dis-
charged upon payment of said damages and costs, from which
judgment the appellants moved for, and were allowed, this Court.
Appellants in their argument have not insisted that their

pleas numbered 1 (all debt), 2 (general demurrer), and 3
(non damification) set up a good defense to the appellee's
cause of action as alleged in the declaration, but they insist
that their pleas, numbered 3, 5, 6 and 7, setting out that the
judgment of the Appellate Court dissolving the bond did not
constitute a breach of the bond, and that they have paid the
damages, amounting to \$483.00, and costs, to the Appellate Court,
set up good defenses.

The demurrer was both general and special. The special
demurrer to these pleas which appellants have not seen fit to
abstract is as follows:

"THIRD PLEA:

(a) Said plea is a plea of special demurrer,
showing the payment of \$483.00 and court costs,
but does not allege that the defendants have
paid the judgment of the County Court, amount-
ing to \$483.98, or the costs, or interest
on said judgment.

(b) Said plea purports to be an answer to the
appellee's whole cause of action, but answers
none of it.

(c) Said plea is the same in substance as defendant's
third plea, filed February 15, 1931, in which a
demurrer was already been sustained by this Court.

"FIFTH PLEA:

(a) Said plea alleges that the judgment of the
County Court has been affirmed, but alleges
facts which show that the dismissal of the appeal
amounted to a regular judicial affirmance of the
judgment and does not constitute an affirmance
of the judgment.

(b) Said plea is in substance the same as defendant's plea No. 3, filed February 16, 1931, to which a demurrer has been sustained.

"SIXTH PLEA:

Said plea of payment of \$45.00 and costs is the same in legal effect as defendants' plea No. 3, and is the same in effect as defendant's plea No. 3, filed February 16, 1931, to which a demurrer has been sustained.

"SEVENTH PLEA:

Said plea of non-affirmance is the same in legal effect as defendants' plea No. 5, and is also the same in effect as defendants' plea No. 3, filed February 16, 1931, to which a demurrer has already been sustained."

The appellee takes the position that for the purpose of this suit on the Appeal Bond the order of this Court dismissing the appeal amounted to a regular technical affirmance of the judgment and, consequently, a breach of the Appeal Bond.

We are of the opinion that the contention of appellee is correct as all of the cases in this state upon the point hold that the dismissal of the appeal under the circumstances as shown in this record "is equivalent to a regular, technical affirmance of the judgment below, so as to entitle the party to claim a forfeiture of the (conditions) of the appeal bond; and have his action therefor." Garrick vs. Chamberlain 97 Ill. 620; People ex ~~xxx~~ rel vs. Sleight 302 Ill. 45; Hubbell vs. Jacobellis 199 App. 379; Grossman vs. Cohen 207 App. 156.

When the original case came here on appeal, the appellant did not perfect his appeal in accordance with the law applicable to such proceedings and this court was, under the mandate of the law, compelled to dismiss the appeal, and inasmuch as the original action was for the recovery of money this court assessed damages therefor. Smith-Hurd Ill. Statute (1931) Chapter 110 Sections 100-101. Also see Storm vs. Ahlering 249 App. 272 and Dray vs. First Natl. Bank 303 Ill. 485.

A satisfaction of that judgment thus entered by this court for failure to perfect the appeal in the first instance can in no sense be regarded as a defense to an action later brought upon the original appeal bond alleging breach of the

(d) Said plea is in substance the same as defendant's plea No. 3, filed February 18, 1931, to which a demurrer has been sustained.

"SIXTH PLEA:

Said plea of payment of \$45.00 and costs is the same in legal effect as defendant's plea No. 3, and is the same in effect as defendant's plea No. 3, filed February 18, 1931, to which a demurrer has been sustained.

"SEVENTH PLEA:

Said plea of non-affirmance is the same in legal effect as defendant's plea No. 3, and is also the same in effect as defendant's plea No. 3, filed February 18, 1931, to which a demurrer has already been sustained."

The appellee takes the position that for the purpose of

this suit on the Appeal Bond the order of this Court dissolving

the appeal amounted to a regular technical affirmance of the

judgment and, consequently, a breach of the Appeal Bond.

We are of the opinion that the contention of appellee

is correct as all of the cases in this state upon the point hold

that the dismissal of the appeal under the circumstances as

shown in this record "is equivalent to a regular, technical

affirmance of the judgment below, so as to entitle the

party to claim a forfeiture of the (conditions) of the appeal

bond; and have his action therefor." *Gurwick vs. Cumberland*

37 Ill. 620; People ex rel vs. Wright 302 Ill. 48; Webb's

vs. Jacobellis 128 App. 379; Groswan vs. Groswan 307 App. 155.

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Chapter 110 sections 100-101. Also see Statute vs. Advertising

249 App. 272 and 273 vs. First Nat'l Bank 305 Ill. 485.

A satisfaction of that judgment thus entered by this

court for failure to perfect the appeal in the first instance

can in no sense be regarded as a defense to an action later

brought upon the original appeal bond alleging breach of the

plain provisions which this bond contained and which are set forth in the above statement of facts. Such a position would be absurd, to say the least, and that contention of appellant is overruled.

The court properly sustained the demurrer to the pleas of appellant and properly proceeded to assess damages.

The appellant's claim that the dismissal of their appeal herein here in the first case here was contrary to law because they did not have any notice of the motion to dismiss is without merit. No notice of such action by the Appellate Court is required by Statute. See Sec. 100 of Chap. 110 Ill. Statutes (supra).

This question, however, was not raised in the record before us and is presented for the first time here.

Appellant further contends that the original judgment is a nullity because the record in that case 2 (not this case) shows that the judge was not present at the time the original case was being tried.

This question, also, is not raised properly in the record now before us either by plea or otherwise and comes too late now. Such a contention should have been raised in the original appeal and due diligence used in perfecting the same.

No error appearing, the judgment of the County Court of Peoria County as presented by this record should be and the same is hereby affirmed.

Affirmed.

plain provisions which this Court considered and which are set forth in the above statement of facts. And a position would be absurd, to say the least, and that contention of appellant is overruled.

The Court properly sustained the demurrer to the answer of appellant and properly proceeded to assess damages. The appellant's claim that the dismissal of their appeal herein here in the first case here was contrary to law because they did not have any notice of the action to dismiss is without merit. No notice of such action by the Appellate Court is required by Statute. See Sec. 100 of Chap. 110 Ill. Statutes (1905).

This question, however, was not raised in the record before us and is presented for the first time here. Appellant further contends that the original judgment is a nullity because the record in that case 2 (not this case) shows that the judge was not present at the time the original case was being tried.

This question, also, is not raised properly in the record now before us either by plea or otherwise and comes too late now. Such a contention should have been raised in the original appeal and the diligence used in perfecting the same. No error appearing, the judgment of the County Court of Peoria County as presented by this record should be and the same is hereby affirmed.

Affirmed.

STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I, JUSTUS L. JOHNSON. Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause. of record in my office.

In Testimony Whereof. I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa. this_____day of _____in the year of our Lord one thousand nine hundred and thirty-_____

Clerk of the Appellate Court

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the second day of February, in the year of our Lord one thousand nine hundred and thirty-two, within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.

Hon. FRED G. WOLFE, Justice.

Hon. JAMES S. BALDWIN, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

265 I.A. 613⁴

BE IT REMEMBERED, that afterwards, to-wit: On

FFB 18 1932 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

General No. 8453

Agenda No. 42.

In the Appellate Court of Illinois

Second District

October Term, A.D. 1931

Marie L. Williams,

appellee,

vs.

Appeal from the Circuit Court

Aurora, Elgin & Fox River Electric

of Kane County

Company, a corporation,

appellant,

BALDWIN, J.

This is a suit brought by appellee against the appellant in the Circuit Court of Kane County, Illinois, to recover damages for personal injuries as well as damages to personal property.

The action grows out of a collision between an automobile of the appellee and the street car of the appellant.

The declaration consisted of two counts, the first count charging negligent operation of the street car of the appellant and the second charging the failure of appellant's servants to keep a proper look out to avoid injury to others and the operation of the street car at a high and dangerous speed.

Trial was had and a verdict and judgment of \$1,500.00 rendered against appellant in favor of the appellee. This appeal is prosecuted to reverse such judgment.

The evidence discloses that on August 29th, 1928, the appellee was riding in her automobile, driven by her eighteen year old son, traveling in a westerly direction upon Highland Avenue in Elgin, Illinois.

The appellant operated a single track street railway line upon Highland Avenue.

Highland Avenue is a paved street about thirty-five feet

In the Appellate Court of Illinois

Second District

October Term, A.D. 1931

WILLIAM L. WILLIAMS,

Appellee,

vs.

Appeal from the Circuit Court

of Kane County

Illinois, John & Fox River Electric

Company, a corporation,

Appellant,

SALUDIN, J.

This is a suit brought by appellee against the appellant

in the Circuit Court of Kane County, Illinois, to recover damages

for personal injuries as well as damages to personal property.

The action grows out of a collision between an automobile

of the appellee and the street car of the appellant.

The declaration consisted of two counts, the first count

alleging negligent operation of the street car of the appellant

and the second charging the failure of appellant's servants to

keep a proper look out to avoid injury to others and the operation

of the street car at a high and dangerous speed.

Trial was had and a verdict and judgment of \$1,500.00

rendered against appellant in favor of the appellee. This appeal

is prosecuted to review said judgment.

The evidence introduced was on August 25th, 1931, the

appellee was riding in her automobile, driven by her eighteen

year old son, traveling in a westerly direction upon Highland

avenue in Elgin, Illinois.

The appellant operated a single track street railway

line upon Highland Avenue.

Highland Avenue is a paved street about thirty-five feet

in width in Elgin and runs in an easterly and westerly direction.

The accident occurred on Highland Avenue between Jackson Street and Lynch Street. Lynch Street on the South side of Highland Avenue and Mountain Street at the North side of Highland Avenue both connect with Highland Avenue at an angle, the angle at Mountain Street being more pronounced than that of Lynch Street. Jackson street runs north and south and intersects Highland Avenue about three hundred feet east of Lynch street. The pavement between the track is slightly lower than the tracks of the appellant's railway line and lower than the pavement outside of the rails. From Jackson street westward Highland Avenue has an upward grade. The appellee's automobile was being driven westward upon Highland Avenue and the appellant's street car was being driven eastward.

The evidence in this case is conflicting but tends to show that the wheels of the automobile as traveling westward were between the tracks of the appellant's railway line; that the street was wet and slippery and that the driver of appellee's automobile had considerable difficulty in getting the wheels of the automobile out of the tracks of the street railway line; that the street car continued forward toward the automobile. It is contended by the appellee that signals of the difficulty were given to the driver of the street car and it is contended by the appellant that signals were given by its motorman.

This case was formerly before this court, Williams vs. Aurora, Elgin and Fox River Electric Company, 257 Ill. App. 655, and the evidence is fully discussed therein and need not be further discussed here. On that occasion this court in its opinion by Mr. Justice Boggs, on substantially the same evidence as produced in this trial, held that under the testimony it was a question of fact for the jury as to whether or not

in with in light and some in an eastward and westward direction.
The accident occurred on Highland Avenue between Jackson
Street and Lynch Street. Lynch Street on the north side of High-
land Avenue and Mountain Street at the north side of Highland
Avenue both connect with Highland Avenue at an angle. The angle
at Mountain Street being more pronounced than that of Lynch
Street. Jackson Street runs north and south and intersects
Highland Avenue about three hundred feet east of Lynch Street.
The pavement between the tracks is slightly lower than the tracks
of the appellant's railway line and lower than the pavement out-
side of the rails. From Jackson Street westward Highland Avenue
has an upward grade. The appellee's automobile was being driven
westward upon Highland Avenue and the appellant's street car was
being driven eastward.
The evidence in this case is conflicting but tends to
show that the wheels of the automobile as traveling westward
were between the tracks of the appellant's railway line; that
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automobile had considerable difficulty in keeping the wheels of
the automobile out of the tracks of the street railway line;
that the street car continued forward toward the automobile.
It is contended by the appellee that wheels of the automobile
were given to the driver of the street car and it is contended
by the appellant that wheels were given by the motor car.
This case was formerly before this court, Williams vs.
Chicago, St. Louis and Northern Indiana Railway, 227 Ill. App. 682,
and the evidence is fully discussed therein and need not be
further discussed here. On that occasion this court in its
opinion by Mr. Justice Rogers, on substantially the same evidence
as presented in this trial, held that under the testimony it
was a question of fact for the jury as to whether or not

appellee and the driver of her automobile were in the exercise of due care just prior to and at the time of the collision and that the court did not err in refusing a new trial upon the ground that appellee had not proven due care. The case was however, reversed because of erroneous instructions.

In the case of *People vs. Militzer*, 301 Ill. 284, page 287 the court said:

The law is well settled that questions of law which have been decided by an appellate court on the appeal of a cause will not be again considered on a second appeal; that they are binding not only on the trial court in the further progress of the cause but also on the appellate court in any subsequent appeal.

In view of the language of the Supreme Court and of our decision rendered in this case upon the former appeal we feel bound in this case to hold that the questions of negligence and of due care and caution are questions of fact for the jury and that the court did not err in refusing to grant a new trial upon the ground that appellee had not proven due care and caution.

It is argued by the appellant that the court erred in refusing to give instructions 9, 10, 11, 13 and 14. Instruction No. 9 is a correct statement of law but the substance thereof is contained in other instructions given in this case and the court did not err in refusing such instruction.

Instruction No. 10 is probably a correct statement of the law and should have been given by the court but inasmuch as a substantial portion of this instruction is covered by other instructions it was not prejudicial error when the court refused to give the instruction.

Instruction No. 11 is a correct statement of law but is not applicable to the facts in this case and such instruction was properly refused by the court.

Instruction No. 13 as applied to the facts in this case would likely tend to mislead the jury and was properly refused

appliance and the driver of the automobile were in the exercise of due care just prior to and at the time of the collision and that the court did not err in refusing a new trial upon the ground that the appliance was not proven due care. It was, however, reversed because of erroneous instructions.

In the case of *People vs. Miller*, 101 Ill. 288, 300, 301 and 302 the court said:

The law is well settled that questions of law which have been decided by an appellate court on the appeal of a case will not be again considered on a second appeal; that they are binding not only on the trial court in the future, but also on the appellate court in any subsequent appeal.

In view of the language of the Supreme Court and of the decision rendered in this case upon the former appeal we feel bound in this case to hold that the questions of negligence and of due care and caution are questions of fact for the jury and that the court did not err in refusing to grant a new trial upon the ground that the appliance was not proven due care and caution. It is argued by the appellant that the court erred in refusing to give instructions 9, 10, 11, 12 and 13. Instruction No. 9 is a correct statement of law but the substance thereof is contained in other instructions given in this case and the court did not err in refusing to give instruction 9. Instruction No. 10 is properly a correct statement of the law and should have been given by the court but inasmuch as a substantial portion of this instruction is covered by other instructions it was not prejudicial error when the court refused to give instruction 10. Instruction No. 11 is a correct statement of law but is not applicable to the facts in this case and such instruction was properly refused by the court. Instruction No. 12 is applied to the facts in this case and would likely tend to mislead the jury and was properly refused.

by the court.

Instruction No. 14 was improper under the evidence in this case and properly refused by the court. Thus, there was no reversible error in the giving or refusing of instructions herein.

Whether the appellee used due care and caution for her own safety and for the safety of her automobile and whether the appellant was negligent were questions for the jury and where there is a conflict in the testimony its verdict will not ordinarily be disturbed. (Illinois Central Railroad Company vs. Gillis, 68 Ill. 317, p. 319).

Two juries have heard the evidence in this case and their verdict has been adverse to the appellant and such verdict should not be disturbed.

The jury was fairly and properly instructed as to the law applicable to the facts and there is no reversible error in the case.

The judgment is affirmed.

Affirmed.

by the court.

Instruction No. 14 was inserted under the advice in this case and properly refused by the court. Thus, there was no reversible error in the giving or refusing of instructions herein. Whether the appellee used the case and waited for her own safety and for the safety of her automobile and whether the appellant was negligent were questions for the jury and there is no conflict in the testimony the verdict will not ordinarily be disturbed. (Illinois Central Railroad Company vs. Illinois, 68 Ill. 2d, 371.)

Two juries have heard the evidence in this case and their verdict has been adverse to the appellant and such verdict should not be disturbed.

The jury was fairly and properly instructed as to the law applicable to the facts and there is no reversible error

in the case.

The judgment is affirmed.

Affirmed.

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause. of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and thirty-_____

Clerk of the Appellate Court

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the second day of February, in
the year of our Lord one thousand nine hundred and thirty-two,
within and for the Second District of the State of Illinois:
Present--The Hon. THOMAS M. JETT, Presiding Justice.

Hon. FRED G. WOLFE, Justice.

Hon. JAMES S. BALDWIN, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

265 I.A. 613⁵

BE IT REMEMBERED, that afterwards, to-wit: On

FEB 18 1932 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

ELSIE M. SEABLOM

Appellee

vs.

HAROLD S. BRADLEY

Appellant

)
Appeal from Circuit Court
of Winnebago County.

Baldwin, J.

This is a case filed to recover damages for personal injuries.

The declaration originally filed in this case consisted of two counts.

In the first count it was charged that the Defendant, Harold S. Bradley, was the owner of an automobile in the said County and which was used by him; that the plaintiff was riding a street car in Loves Park; that she was about to get out of the said street car at a point just inside the city limits (no proof of the city limits offered) of Rockford on North 2nd Street opposite a telephone station at siding #51; that at the time she was in the exercise of due care and caution for her own safety.

That the Defendant was driving his automobile in a South-erly direction on North 2nd Street and that at the point indicated the Defendant, Bradley, carelessly and negligently drove and operated said automobile and failed to stop when the street car stopped and struck the Plaintiff as she was alighting from the street car and that she was thrown upon the street and injured and that she incurred expenses for doctors, nurses, medicine, hospital bills, clothes, etc., in the sum of \$750.00.

The ad damnum in said count was \$10,000.00

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

Appeal from Circuit Court
of Winnebago County.

ERNEST W. BRADLEY
Appellee
vs.
HAROLD S. BRADLEY
Appellant

Baldwin, J.

This is a case filed to recover damages for personal in-

juries.

The declaration originally filed in this case consisted

of two counts.

In the first count it was charged that the Defendant,

Harold S. Bradley, was the owner of an automobile in the said
County and which was used by him; that the plaintiff was riding
a street car in Loves Park; that she was about to get out of the
said street car at a point just inside the city limits (no proof
of the city limits offered) of Rockford on North 7th Street
opposite a telephone station at siding #51; that at the time she was
in the exercise of due care and caution for her own safety.

That the Defendant was driving his automobile in a south-
ely direction on North 7th Street and that at the point indicated
the Defendant, Bradley, carelessly and negligently drove and oper-
ated said automobile and failed to stop when the street car stopped
and struck the plaintiff as she was alighting from the street car
and that she was thrown upon the street and injured and that she
incurred expenses for doctors, nurses, medicine, hospital bills,
clothing, etc., in the sum of \$750.00.

The ad damnum in said count was \$10,000.00

The second count in the declaration is substantially the same thing except it was alleged that the Defendant, Harold S. Bradley, willfully and wantonly drove said automobile, etc.

It appears that at the close of the trial the Court entered an order striking the second count (the wilful and wanton count) from the declaration and allowed the case to go to the jury upon the first count in the declaration. Verdict in the sum of \$1000.00 was for Plaintiff.

The summary of the evidence, as we view it, is substantially as follows:

The Plaintiff, Elsie Seablom, boarded a street car at Court and West State Streets in Rockford to go home ~~further~~ from her work and went North in the said car to the stop on North 2nd Street at the point indicated in the declaration and arrived there about 5:45; that it was raining or had been raining and that the streets were very wet; that after the car stopped the husband of the plaintiff drove past the street car in an automobile, blew his horn and stopped; that the plaintiff then walked rapidly to the front of the street car (which had remained standing) in which she was riding and requested the motorman to permit her to alight; he opened the door and she stepped from the car and, according to her testimony, looked back and saw the motor car of the defendant coming. She says "it was coming awful fast but it was dark and I couldn't judge the distance and I started to run for the curb. I thought I could make it but I didn't and the car struck me." Other witnesses, who were riding in the car of the Defendant, say that the Plaintiff ~~xx~~ stepped or jumped from the step of the street car and without looking in any direction started across the street in an oblique direction and all of the testimony seems to be that when she arrived at a point three or four steps away from the street car the defendant's automobile struck her and she fell to the pavement.

The testimony on behalf of the Defendant is that there were three automobiles, two ahead of him and his own. That he saw the

The second count in the declaration is substantially the same thing except it was alleged that the Defendant, Harold B. Bradley, willfully and wantonly drove said automobile, etc. It appears that at the time of the trial the Court entered an order striking the second count (the willful and wanton count) from the declaration and allowed the case to go to the jury upon the first count in the declaration. Verdict in the sum of \$1000.00 was for Plaintiff. The summary of the evidence, as we view it, is substantially as follows:

The Plaintiff, Alice Beahm, boarded a street car at Court and West State Streets in Rockford to go home farther from her work and went North in the said car to the stop on North and Street at the point indicated in the declaration and arrived there about 5:45; that it was raining or had been raining and that the streets were very wet; that after the car stopped the husband of the Plaintiff drove past the street car in an automobile, blew his horn and stopped; that the Plaintiff then walked rapidly to the front of the street car (which had remained standing) in which she was riding and requested the motorman to get it out to the right; he opened the door and she stepped from the car and, according to her testimony, looked back and saw the motor car of the defendant coming. She says "it was coming within feet but it was dark and I couldn't judge the distance and I started to run for the curb. I thought I could make it but I didn't and the car struck me." Other witnesses, who were riding in the car of the Defendant, say that the Plaintiff as stepped on, turned from the step of the street car and without looking in any direction started across the street in an oblique direction and all of the testimony seems to be that when she arrived at a point three or four steps away from the street car the defendant's automobile struck her and she fell to the pavement. The testimony on behalf of the Defendant is that there were three automobiles, two of which and his own. That he saw the

street car standing perfectly still when he was approximately a block away; that the second automobile ahead of the defendant, when it reached a point slightly in front of where the street car was standing, pulled over to the curb and stopped (this was the automobile of Plaintiff's husband); that the car immediately in front of the defendant slowed down and drove very slowly about five miles per hour past the car which had stopped. The defendant also slowed down his car and drove about five miles per hour along side of the street car and that when he was at a point about five or six feet to the rear of the front door on the right hand side of the said street car the door suddenly opened and the plaintiff stepped out of the car and took three steps away from the street car and in front of the automobile. That the defendant's automobile was equipped with four wheel brakes, all in good working condition; that the defendant's automobile stopped within eight feet of the place where it was situated at the time the plaintiff stepped from the street car; that the automobile did not move over one or two feet after striking the plaintiff.

Defendant saw the street car standing when he was about a block away and the street car did not move from the time he first saw it.

A passenger, as well as the motorman of the car, testified that the plaintiff moved up the aisle of the standing street car rapidly and requested the motorman to open the door to permit her to alight.

Some objection is made in the brief that the original count in the declaration did not contain the averment that the plaintiff "was in the exercise of due care and caution for her own safety" and that such allegation was not placed there until the count was amended at sometime after the verdict of the jury.

No error to the permitting of this amendment (if it was made) has been assigned by the appellant and there is nothing in the abstract of record to indicate the amendment complained of and the appellant not having assigned error and preserved the record of such amendment should be held to have waived objection thereto.

street car standing perfectly still when he was approached. Plaintiff saw the second automobile ahead of the first car when it reached a point slightly in front of where the first car was standing, pulled over to the curb and stopped (this was the automobile of Plaintiff's husband); that the car in Plaintiff's front of the defendant allowed down and drove very slowly about five miles per hour past the car which had stopped. The defendant also allowed down his car and drove about five miles per hour along side of the street car and that when he was at a point about five or six feet to the rear of the front door on the right hand side of the said street car the door suddenly opened and the Plaintiff stepped out of the car and took three steps away from the street car and in front of the automobile. That the defendant's automobile was equipped with four wheel brakes, all in good working condition; that the defendant's automobile stopped within eight feet of the place where it was situated at the time the Plaintiff stepped from the street car; that the automobile did not move over one or two feet after striking the Plaintiff.

Defendant saw the street car standing when he was about a block away and the street car did not move from the time he first saw it.

A passenger, as well as the motorist of the car, testified that the Plaintiff moved up the aisle of the standing street car rapidly and requested the motorist to open the door to permit her to alight.

Some objection is made in the brief that the original count in the declaration did not contain the averment that the Plaintiff was in the exercise of due care and caution for her own safety and that such allegation was not placed there until the count was amended at sometime after the verdict of the jury.

As to the granting of this amendment (if it was made) has been assigned by the appellant and there is nothing in the abstract of record to indicate the amendment complained of and the appellant not having claimed error and preserved the record of such contention should be held to have waived objection thereto.

It seems to us that this entire case turns upon the question of whether the plaintiff exercised due care and caution and we believe that a fair analysis of the testimony, both on the part of the plaintiff and of the defendant, manifestly demonstrates that the plaintiff not only did not exercise due care and caution for her own safety but has, by her own testimony, proven that she was guilty of contributory negligence which directly contributed, if not actually caused the accident.

It seems to us that no other inference can be drawn from the testimony in this case and if this is true the plaintiff should be held to be guilty of contributory negligence as a matter of law. (Johandes vs. Chicago M. & S. P. R. R. 260 Ill. App.328, p.331).

However, a more decisive question is presented. At the close of plaintiff's evidence and again at the close of all the evidence, the defendant moved the court to instruct the jury to find the defendant not guilty, which motions were denied and the tendered instruction refused, thus presenting the question for our determination whether it can be said, as a matter of law, that plaintiff was guilty of contributory negligence. While the courts of this state have usually left the question of due care on the part of the plaintiff, to the determination of the jury as a question of fact, Yet, there are many decisions in this and other jurisdictions, holding that as a matter of law, plaintiff under similar circumstances, cannot recover. (Lake Shore and Michigan Southern R.R. Co. v. Hart, 87 Ill. 529; Baltimore & Ohio R. R. Co. v. Goodman, 48 U. S. Supreme Court 24).

The foregoing cases seem to us convincing and we therefore hold that plaintiff was guilty of negligence directly contributing to the accident as a matter of law and that the trial court should have directed a verdict for the defendant. For this reason the judgment will be reversed without remanding. (Collins v. Kurth,

322 Ill. 250).

Cause reversed with a finding of fact.

(Finding of Fact to be incorporated in the judgment:-)

"The court finds, as a matter of law, that the plaintiff was guilty of contributory negligence directly contributing to the accident and that the trial court should have directed a verdict for the defendant because the evidence did not tend to establish a cause of action."

323.111.237).

Cases reviewed with a view to the

(finding of fact to be established in the

"The court finds, on a matter of law, that the plaintiff has failed

of contributory negligence directly contributing to the accident

and that the trial court should have directed a verdict for the

defendant because the evidence did not fail to establish a cause

of action."

STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and thirty-_____

Clerk of the Appellate Court

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the second day of February, in
the year of our Lord one thousand nine hundred and thirty-two,
within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.

Hon. FRED G. WOLFE, Justice.

Hon. JAMES S. BALDWIN, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff. /

265 I.A. 614¹

BE IT REMEMBERED, that afterwards, to-wit: On

FEB 18 1932 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

THE MOUND GROVE CEMETERY
ASSOCIATION OF KANKAKEE CITY,
Appellee.

vg.

GEORGE M. DILLEY AND KANKAKEE
INDIVIDUAL MAUSOLEUM COMPANY,
A Corporation,
Appellant.

Appeal from the
Circuit Court of
Kankakee County,
Illinois.

Wolfe, J.

This is an appeal from the order entered by the Circuit Court of Kankakee County granting a permanent injunction restraining the appellants from installing what is designated by them as an "individual mausoleum" on the cemetery lot of the appellant, George M. Dilley. The hearing was before the chancellor and the evidence has been preserved in the record here.

In the court below, the Mound Grove Cemetery Association of Kankakee was complainant and said George M. Dilley and the Kankakee Individual Mausoleum Company were defendants, and hereinafter the parties will be so respectfully designated unless their names are used. The complainant was incorporated in 1879 as a corporation not for profit, and purchased land which it platted, used and devoted to cemetery purposes. On September 23, 1891, the complainant sold to, and by deed conveyed to Dilley a lot in its cemetery. The deed is in the usual form of a short warranty deed, which restricts the use of the lot to cemetery purposes. The complainant reserves the right to ornament the streets, avenues and walks around said lot by planting of such trees and shrubbery as it may deem best; also to grade and gravel the drives. All ornamentation or improvements of said lot shall be subject to the rules and by-laws of the complainant to do all and everything it may deem proper for the purpose of beautifying the grounds of the cemetery.

On June 1, 1920, Dilley deposited with the complainants

Appeal from the
Circuit Court of
Kankakee County,
Illinois.

THE MOUND GROVE CEMETERY
ASSOCIATION OF KANKAKEE CITY,
Appellee,

vs.

GEORGE M. DILLEY AND KANKAKEE
INDIVIDUAL MANUSOLEUM COMPANY,
A Corporation,
Appellant.

Vol. 1.

This is an appeal from the order entered by the Circuit Court of Kankakee County granting a permanent injunction restraining the appellants from installing what is designated by them as an "individual mansoleum" on the cemetery lot of the appellant, George M. Dilley. The hearing was before the chancellor and the evidence has been preserved in the record here.

In the court below, the Mound Grove Cemetery Association of Kankakee was complainant and said George M. Dilley and the Kankakee Individual Mansoleum Company were defendants, and hereinafter the parties will be so respectfully designated unless their names are used. The complainant was incorporated in 1879 as a corporation not for profit, and purchased land which it plat- ted, used and devoted to cemetery purposes. On September 23, 1891, the complainant sold to, and by deed conveyed to Dilley a lot in its cemetery. The deed is in the usual form of a short warranty deed, which recites the use of the lot to cemetery purposes. The complainant reserves the right to ornament the streets, avenues and alleys around said lot by planting of trees and shrubbery as it may deem best; also to grade and gravel the drives. All ornamentation or improvement of said lot shall be subject to the rules and by-laws of the complainant to do all and everything it may deem proper for the purpose of beautifying the grounds of the cemetery.

On June 1, 1920, Dilley deposited with the complainant

the sum of \$25.00, in consideration of which the complainant signed an agreement whereby it agreed to receive and hold said sum in trust forever, and invest the same with funds of like character, and apply the income from time to time to the care of graves, grass and the preservation of the trees and shrubs on said lot, the surplus, if any, at the end of each year to remain as a sinking fund. This fund is not to be used for any purpose but for the care of said lot and the cemetery grounds other than lots, and no other lot or lots whatsoever.

It appears from the bill and the answer of the defendants thereto, that Mr. Dilley entered into a contract with the Kankakee Individual Mausoleum Co. for the installation on his cemetery lot of an individual mausoleum for use in the future. The date when the contract was entered into does not appear in the record filed herein. These mausoleums are made by the said company and the interior thereof, their construction, and method of installation, are a new invention and process first used, and probably discovered, in the year 1921.

Such a mausoleum, as the vault or sepulcher will be herein designated, is made of concrete and worked up while moist in a wooden form in such a manner as to form a box. When finished and ready for placing in the ground, the mausoleum is eight feet long and somewhat wider than a casket, and three feet high. The Mausoleum is placed in the earth so that the top of the sides are level with the surface of the ground. The covering is entirely above ground, there being no earth or sod over the tomb thus constructed. The lid is flat, but at one end there is a projection shaped as an incline plane on the sloping side of which is fastened a bronze plate for the inscription, and which rests at the head of the grave, the finished mausoleum being a combination of tomb and monument. It appears from the evidence that no such mausoleums have been installed in the Mound Grove Cemetery.

The bill for an injunction was filed on the 25th day of June, 1931, and alleges in part as follows: That shortly after the organization of the cemetery association, and before the deed was delivered to Dilley, the directors adopted rules and regulations to govern the method of the interment of the dead, and the erection

the sum of \$5.00, in consideration of which the complainant agreed an agreement whereby it agreed to receive and hold said sum in trust forever, and invest the same with funds of like character, and apply the income from time to time to the care of graves, trees and the preservation of the trees and shrubs on said lot, the surplus, if any, at the end of each year to remain as a sinking fund. This fund is not to be used for any purpose but for the care of said lot and the cemetery grounds other than lots, and no other lot or lots whatsoever. It appears from the bill and the answer of the defendants thereto, that Mr. Dilley entered into a contract with the Ennskee Individual Mausoleum Co. for the installation on its cemetery lot of an individual mausoleum for use in the future. The date when the contract was entered into does not appear in the record filed herein. These mausoleums are made by the said company and the interior thereof, their construction, and method of installation, are a new invention and process first used, and probably discovered, in the year 1921. Such a mausoleum, as the vault or sepulcher will be herein designated, is made of concrete and worked up while moist in a wooden form in such a manner as to form a box. When finished and ready for placing in the ground, the mausoleum is eight feet long and somewhat wider than a casket, and three feet high. The mausoleum is placed in the earth so that the top of the sides are level with the surface of the ground. The covering is entirely above ground, there being no earth or sod over the tomb thus constructed. The lid is flat, but at one end there is a projection shaped as an incline plane on the sloping side of which is fastened a bronze plate for the inscription, and which rests at the head of the grave, the finished mausoleum being a combination of tomb and monument. It appears from the evidence that no such mausoleums have been installed in the Round Grove Cemetery.

The bill for an injunction was filed on the 25th day of June, 1921, and alleges in part as follows: That shortly after the organization of the cemetery association, and before the deed was delivered to Dilley, the directors adopted rules and regulations to govern the method of the interment of the dead, and the erection

of vaults and monuments, the planting of trees or shrubs in and upon the cemetery graves, and upon the lots sold, including the lot sold to Dilley, all of which was for the purpose of having a uniform scheme of development and beautification of said cemetery lots, blocks and grounds.

Among the rules and regulations so adopted and put in force and afterward adhered to by said association were the following: (1) "The erection of vaults or tombs above ground will not be allowed unless special permission is first had from the Board of Managers. And in no instance will permission be given to erect vaults or tombs as a receptacle^{edle} for bodies above ground, in localities where they will be objectionable and injurious to the surrounding lots. Applications for permission to build such structures must be accompanied with plans and specifications of the proposed vault or tomb, and its intended location in the cemetery.

(2) "All graves shall be opened and closed by employees of the association, under the direction of the superintendent and shall not be less than five feet in depth and no mound shall be raised upon any grave exceeding $2\frac{1}{2}$ inches in height above the surface."

(3) "Be it resolved that all burial receptacles placed in the Mound Grove Cemetery shall have a covering of two feet or more of dirt above said receptacle and shall be placed at least two feet below the level of the ground. And this resolution is hereby made a part of the rules and regulations governing said cemetery."

The bill charges that the said George M. Dilley, contrary to the rules and regulations of the complainant and without its permission contracted with the defendant, the Kankakee Individual Mausoleum Company, to place upon his lot an individual mausoleum, which, if placed upon said lot in the manner proposed, will extend above the ground and will not be in harmony with its surroundings and will injure the beauty of said cemetery; that it will disfigure the grounds and will irreparably damage said

of vaults and monuments, the planting of trees or shrubs in and upon the cemetery graves, and upon the lots sold, including the lot sold to Billee, all of which was for the purpose of having a uniform scheme of development and beautification of said cemetery lots, blocks and grounds.

Among the rules and regulations so adopted and put in force and after and agreed to by said association were the following: (1) "The erection of vaults or tombs above ground will not be allowed unless special permission is first had from the Board of Managers. And in no instance will permission be given to erect vaults or tombs as a receptacle for bodies above ground, in localities where they will be objectionable and injurious to the surrounding lots. Applications for permission to build such structures must be accompanied with plans and specifications of the proposed vault or tomb, and its intended location in the cemetery.

(2) "All graves shall be opened and closed by employees of the association, under the direction of the superintendent and shall not be less than five feet in depth and no monument shall be raised upon any grave exceeding 48 inches in height above the surface." (3) "Be it resolved that all burial receptacles closed in the Mount Grove Cemetery shall have a covering of two feet or more of dirt above said receptacle and shall be placed at least two feet below the level of the ground. And this resolution is hereby made a part of the rules and regulations governing said cemetery."

The bill charges that the said George W. Billee, contrary to the rules and regulations of the corporation and without its permission contracted with the defendant, the Kansas Individual Mausoleum Company, to place upon his lot an individual mausoleum, which, if placed upon said lot in the manner proposed, will extend above the ground and will not be in harmony with the surroundings and will injure the beauty of said cemetery; that it will disfigure the grounds and all thereon and thereby damage said

cemetery and will diminish the desirability and value thereof as a burying place for the dead. The bill alleges the execution by the complainant and said Dilley of the agreement heretofore mentioned. The contract for the perpetual care of said lot is pleaded verbatim. Since the execution of said contract the complainant has continued to care for said lot as required under the terms of said agreement.

The bill also alleges that said mausoleum if placed on said lot it will not withstand the action of the elements, but will deteriorate, its joints will open and leak, the top will become discolored and in order to keep the mausoleum in suitable condition to serve the purpose for which it is intended, to prevent its becoming unsightly and unsanitary, if in fact by reasonable care and attention it can be kept from becoming unsightly and unsanitary, will require much care and attention; that also said mausoleum being subject to be opened by the action of the elements, will materially increase the burden and responsibility of the complainant in keeping said lot in condition, according to said agreement for perpetual care. That no construction of vaults or receptacles for the dead has been permitted in said cemetery, except the same were placed at least two feet below the surface of the ground, or the receptacle for the burial has been a vault of stone, properly constructed with crypts hermetically sealed, and so placed as to be fully protected from the action of the elements; that all construction of vaults and other containers placed in said cemetery for the burial of dead bodies, and all interments in the same, have been under the supervision, direction and control of the officers and employees of the complainant.

Answers to the bill were filed by the defendant. The answers demand strict proof of the adoption by the cemetery association of the rules and regulations alleged in the bill to have been adopted. That Rule 3, (pleaded in the bill) was adopted May 6, 1931, forty years after the defendant Dilley purchased his lot, during which time other lot owners had placed mausoleums of a different type and structure than the one in question, above

every one will find the desirability and value thereof a lasting place for the dead. The bill alleges the execution by the complainant and said Miller of the present testament mentioned. The contract for the perpetual care of a lot is placed verbatim. Since the execution of said contract the complainant has continued to use the said lot as required under the terms of said agreement.

The bill also alleges that said monument is placed on said lot it will not witness the action of the elements, but will deteriorate, its joints will open and leak, the top will become discolored and in order to keep the monument in suitable condition to serve the purpose for which it is intended, to prevent its becoming unsightly and unsanitary, it is requested by the complainant that it can be kept from becoming unsightly and unsanitary, will require such care and attention; that also said monument being subject to be opened by the action of the elements, will necessarily increase the burden and responsibility of the complainant in keeping said lot in condition, according to said agreement for perpetual care. That no construction of rights or responsibilities for the dead has been permitted in said cemetery, except the grave were placed at least two feet below the surface of the ground, or the receptacle for the burial has been a vault of stone, and as properly constructed with proper foundation, and as placed as to be fully protected from the action of the elements; that all construction of vaults and other structures placed in said cemetery for the burial of dead bodies, and all interments in the same, have been under the supervision, direction and control of the officers and employees of the complainant.

Wherefore the bill was filed by the defendant. The plaintiff denies every part of the allegation of the complainant of the alleged violation of the rules and regulations alleged in the bill to have been adopted. That said bill, (placed in the bill) was adopted May 1, 1911, forty years after the defendant Miller purchased his lot, during which time other lots owned and placed in said cemetery were constructed under the same rules and regulations.

the ground and have made repeated interments therein and that said mausoleum did not have a covering of at least two feet of dirt as required by said rule; that the passage of said rule was illegal and void as discriminating against the defendant Dilley in the lawful use of his lot for burial purposes. The answers deny that the mausoleum will extend above the ground or will injure the beauty of the cemetery or in any way disfigure the grounds or irreparably damage said cemetery or diminish the desirability or value thereof as a burying place for the dead.

The answers deny that the mausoleum is constructed of concrete so placed that its cemented joints will be subject to being opened by the action of the elements, and thereby increase the burden of said complainant in keeping said lot in condition according to the terms of the perpetual care agreement, even if complainant has agreed to furnish perpetual care, which defendants deny. The answers aver that during the fall of 1929 the agents of the defendant, Kankakee Individual Mausoleum Company, were advised by the complainant, or their representatives, that there would be no objection to the use of said mausoleums in said cemetery; that defendant complied with the rules and regulations of the complainant by tendering to it the sum of fifteen dollars which is the usual charge for opening a grave in said cemetery; that upon refusal of said complainant to make the necessary opening, the defendants proceeded to install a mausoleum upon said lot and were stopped by the injunction of the court.

The answers admit that in the cemetery of the complainant there are a number of vaults of stone, permitting burial in receptacles above the ground, but deny that said vaults or any of them are so sealed or placed as to fully be protected from the action of the elements. The answers admit that the construction of vaults and other containers placed in said cemetery and interments in the same have been made under the supervision, direction and control of the officers and employees of the complainant and that defendant Dilley is willing to place said mausoleum under the supervision, direction and control of the

The ground and have also reported interests therein and that said ground did not have a covering of at least two feet of dirt as required by said rule; but the passage of said rule was illegal and void as discriminating against the defendant Dille in the lawful use of his lot for burial purposes. The answers deny that the Mausoleum will extend above the ground or will injure the beauty of the cemetery or in any way diminish the grounds or irreparably damage said cemetery or diminish the desirability or value thereof as a burying place for the dead.

The answers deny that the Mausoleum is constructed of concrete so placed that its cemented joints will be subject to being opened by the action of the elements, and thereby increase the burden of said complainant in keeping said lot in condition according to the terms of the perpetual care agreement, even if complainant has agreed to furnish perpetual care, which defendants deny. The answers aver that during the Fall of 1928 the agents of the defendant, Kentucky Individual Mausoleum Company, were advised by the complainant, or their representative, that there would be no objection to the use of said Mausoleum in said cemetery; that defendant conspired with the wife and husband as of the complainant by tendering to it the sum of fifteen dollars which is the usual charge for opening a grave in said cemetery; that upon refusal of said complainant to make the necessary opening, the defendants proceeded to install a Mausoleum upon said lot and were stopped by the injunction of the court.

The answers admit that in the cemetery of the complainant there are a number of vaults of stone, permitting burial in receptacles above the ground, but deny that said vaults on any of them are so sealed or placed as to fully be protected from the action of the elements. The answers admit that the construction of vaults and other containers placed in said cemetery and interest in the same have been and are under the supervision, direction and control of the officers and employees of the complainant and that defendant Dille is willing to place said Mausoleum under the supervision, direction and control of the

complainant and has only failed to do so because said complainant refused to so supervise, direct and control the installation of said mausoleum.

From the above outline of the pleadings, it is clear that the burden was placed upon the complainant to prove the following issues raised by the pleadings: 1-That the rules set forth in the bill and herein designated as 1 and 2, were duly adopted by the directors of the cemetery association; 2- That rule 3 is not discriminatory against the defendant Dilley, nor in derogation of his deed and that its enforcement has not been waived by the conduct of the complainant; 3- that the mausoleum was to be so constructed and placed in the ground as to be subject to the action of the elements and would become unsightly and unsanitary and that as a result of such condition the burden of the complainant under the agreement for perpetual care of the Dilley lot, would be materially increased; 4, that the finished mausoleum in the cemetery would become unsightly and unsanitary, disfigure the cemetery grounds and cause irreparable injury or damage to the cemetery.

On the first issue thus presented, the defendant in their argument contend that the record book of the complainant wherein the minutes were recorded, does not show that rules 1 and 2 were adopted by the Board of Directors of the cemetery association, and certain pages of the abstract of the evidence are referred to by defendants in support of their position. No cases are cited by any of the counsel in the case that an entry in writing in the record book of the corporation is necessary to prove or sustain the adoption of by-laws by a corporation. No cases are cited on the further proposition that the existence of by-laws and their adoption by a corporation may be established by custom, or by the acquiescence in a course of conduct by those to enact them.

We find upon examination of the evidence that Charles F. Witmore, the secretary of the Mound Grove Cemetery Association, and who has held such position for almost fifty years, testified that the record book of the association shows that at a meeting

organization and was only failed to do so because with complaint
refused to so preserve, direct and control the installation of
said association.

From the above outline of the evidence, it is clear that
the writer was placed upon the complaint to prove the following
issues raised by the plaintiff: 1-That the rules set forth in the
Bill and herein designated as 1 and 2, were duly adopted by the
directors of the cemetery association; 2-That rule 2 is not
discriminatory against the defendant; 3-That the defendant's
conduct and that the enforcement of the rules was not based upon the conduct of
the complainant; 4-That the association has the right to construct
and alter in the grounds to be subject to the action of the
elements and would become unhealthily and unsanitary and that as a
result of such condition the burden of the complainant under the
agreement for perpetual care of the burial lot, would be materially
increased; 5-That the finished mausoleum in the cemetery grounds
become unhealthily and unsanitary, difficult for the cemetery grounds
and cause irreparable injury or damage to the cemetery.

On the first issue to be presented, the defendant in their
argument contend that the record book of the cemetery association
the minutes were recorded, does not show that rules 1 and 2 were
adopted by the Board of Directors of the cemetery association,
and certain pages of the minutes of the evidence are referred to
by defendant in support of their position. In cases are cited
by and of the court in the case that in order to sustain
record book of the corporation is necessary to prove or sustain
the adoption of by-laws by a corporation. In cases are cited on
the further proposition that the existence of by-laws and their
adoption by a corporation may be established by other, or by
the evidence in a course of conduct by those to enact them.

We find upon examination of the evidence that Charles W.
Hill, the secretary of the Board of Directors of the cemetery association,
and who has held such position for about fifty years, testified
that the record book of the association shows that at a meeting

of its directors held on February 27, 1904, as follows: "The president appointed Mr. H. Kramer, J. E. Sherwood and W. R. Hickox, a committee to prepare a set of rules and regulations for the government of the cemetery grounds. Said committee reported by presenting a set of rules and regulations which were read, and on motion adopted, and the committee authorized to have two hundred copies printed". The record book was introduced in evidence, Exhibit 1 of the complainant.

Mr. Whitmore also testified that there is no record book of the complainant in which he copied those rules in extenso; that there was a set of rules and regulations presented that night. The witness thereupon identified a pamphlet introduced by complainant, and known as Exhibit 2, and stated that it is one of the copies printed pursuant to the resolution above mentioned. The pamphlet is entitled, "Rules and Regulations of Mound Grove Cemetery Association." Mr. Whitmore and W. R. Hickox, the latter president of the association, and such for twenty to twenty-five years, and prior thereto for many years a director, both testified that the rules and regulations in the pamphlet have been considered and adhered to as rules and regulations of the Mound Grove Cemetery Association since the meeting of February 27, 1904.

Arthur H. Plante, superintendent of the cemetery for over thirty years and whose father was superintendent for eighteen years, testified that he never knew of any different rules in printed form than those contained in the pamphlet; that the rules of the association before 1904 were adopted verbally. The many years of service of these gentlemen as officers and servants of the complainant, and their candor and fairness as shown by their testimony, is impressive. Their testimony relating to the existence and adherence to the by-law of the association as shown in the pamphlet is uncontradicted and not subject to any doubt whatsoever.

In the case of the Star Loan Association vs. Moore, 20 Del. 308, 55 Atl. 946, it was held, that where, in an action by a corporation, its president testified that a certain book contained

of its directors held on February 27, 1904, as follows: The president expressed Mr. E. E. Howard and J. W. Nichols, a committee to prepare a set of rules and regulations for the government of the society. This committee reported by presenting a set of rules and regulations which were read, and an action adopted, and the committee authorized to have two hundred copies printed. The record book was introduced in evidence.

Exhibit 1 of the complaint.

Mr. Whitmore also testified that there is no record book of the complaint in which he copied these rules in entirety; that there was a set of rules and regulations presented that night. The witness thereupon identified a pamphlet introduced by complaint, and says as Exhibit 2, and stated that it is one of the copies printed pursuant to the resolution above mentioned. The pamphlet is entitled, "Rules and Regulations of the Iowa Game Wren Association." Mr. Whitmore and W. R. Nichols, the latter president of the association, and each for twenty to twenty-five years, and other thereto for many years a director, both testified that the rules and regulations in the pamphlet have been considered and referred to as rules and regulations of the Iowa Game Wren Association since the meeting of February 27, 1904.

Arthur M. Blaine, superintendent of the society for over thirty years and whose list was superintendent for eighteen years, testified that he never knew of any different rules in printed form than those contained in the pamphlet; that the rules of the association before 1904 were altered verbally. The many years of service of these gentlemen as officers and members of the complaint, and their conduct and fairness as shown by their testimony, is impressive. Their testimony relative to the existence and reference to the by-law of the association as shown in the pamphlet is uncontradicted and not subject to any doubt whatever.

In the case of the Star Line Association vs. Woods, 20 Cal. 302, 55 Am. 469, it was held, that where, in an action by a corporation, the president testified that a certain book contained

the by-laws of the association which had been used and recognized generally by the members, and that there was no set of by-laws copied into the minutes, the book containing the by-laws was admissible in evidence. We are of the opinion that the record herein contains prima facie proof of the adoption and existence of the by-laws as shown in the pamphlet which was properly admissible ~~with~~ in evidence. *Knights and Ladies of America vs. Weber*, 101 Ill., 488; *Board of Education of Dist. No. 3 vs. Taft*, 7 Ill., App. 571; *School Directors vs. Kimmel*, 31 Ill., App. 537; *Lockwood vs. Mechanics' Nat'l. Bank*, 9 R. I., 308, 11 Am. Rep. 253. There is no conclusive or convincing evidence in the record filed herein showing or proving the adoption or existence of any rules or regulations of the cemetery existing before 1904.

Under his deed Dilley was granted the right to use his lot for burial and cemetery purposes, and which included the right to do so according to the usual custom in the neighborhood and of making mounds over and erecting stones and monuments at the grave. But such right to so use the lot was subject to the lawful rules and regulations of the complainant made by its directors for the use of the lots in the cemetery. *McWhirter vs. Newell*, 200 Ill. 283; *Mt. Hope Cemetery Association vs. The New Mt. Hope Cemetery Association, et al* 246 Ill. 416; *Brown vs. Hill*, 284 Ill., 286; *Pitcairn vs. Home Wood Cemetery* 229 Pa. 18; 77 Atl., 1105. The deed does not limit the right of burial to be subject to rules of the complainant to be adopted by it after the execution of the deed, as is very frequently done in cemetery deeds. In determining the legality of such rules, the rights of the lot owners are to be considered. *Smith-Hurd Ill. Rev. Stat. Chap. 21, Par. 15*; *The People vs. Cemetery Co.* 258 Ill. 36.

It is contended by the defendants that cemetery rule 1 is not applicable to the mausoleum and it does not by its terms restrict the right of Dilley to install a mausoleum in his lot. With this contention we cannot agree. The mausoleum is nothing else than a tomb, and it is partly above ground. It clearly falls

the by-laws of the association which had been used and recognized generally by the members, and that there was no act of by-laws couched in the minutes, the book containing the by-laws was inadmissible in evidence. The rule of the court that the record herein contains prima facie proof of the adoption and existence of the by-laws as shown in the pamphlet which was properly admitted within in evidence. *Knights and Ladies of America vs. Weber*, 101 Ill., 418; *Board of Education of Dist. No. 2 vs. Tait*, 7 Ill., App. 571; *School Directors vs. Kimmel*, 21 Ill., App. 587; *Lawson vs. Mechanics' Nat'l Bank*, 9 R. 1., 308, 11 Ill. App. 383. There is no conclusive or convincing evidence in the record filed herein showing or proving the adoption or existence of any rules or regulations of the cemetery existing before 1904.

Under his deed Wiley was granted the right to use his lot for burial and cemetery purposes, and which included the right to do so according to the usual custom in the neighborhood and of making mounds over and erecting stones and monuments at the grave. But such right to so use the lot was subject to the lawful rules and regulations of the complainant made by its directors for the use of the lots in the cemetery. *McWhorter vs. Sewall*, 200 Ill., 483; *Hope Cemetery Association vs. The New Mt. Hope Cemetery Association*, et al 248 Ill. App. Brown vs. Hall, 224 Ill., 289; *Pittsford vs. Hope Good Cemetery* 222 Pa. 18; 77 Atl., 1108. The deed does not limit the right of burial to be subject to rules of the complainant to be adopted by it after the execution of the deed, as is very frequently done in cemetery deeds. In determining the locality of such rules, the rights of the lot owners are to be considered. *Smith-Burd Ill. Dev. Stat. Chm.* 21, Part. 16; *The People vs. Cemetery Co.* 188 Ill. 88.

It is contended by the defendants that cemetery rule 1 is not applicable to the complainant and it does not by its terms restrict the right of Wiley to install a monument in his lot. With this contention we cannot agree. The restriction is not in any sense a term, and it is partly above ground. It clearly falls

within the provisions of rule 1. No private tombs or mausoleums of any kind extending above ground have been erected or constructed in the cemetery since 1904. Two substantial and well built mausoleums of stone were erected in 1880. In 1897 a mausoleum of granite and cement blocks was erected in the cemetery with the permission of the cemetery directors. Arthur H. Plante, the superintendent, testified that in 1888 or 1890 three vaults, each with a large stone, such as a flag stone and about six inches thick, over the tops were placed in the cemetery; the tops are not covered with dirt and extend above the ground. The sides of two of these vaults are made of Kankakee limestone and the sides of the other is made of brick. These vaults contain bodies, but whether they are in crypts hermetically sealed, as alleged in the bill, does not appear in the evidence. The bill alleges, and the answers admit, that all constructions of vaults and other containers placed in the cemetery for the burial of the dead, and all interments in the same, have been under the supervision, direction and control of the officers and employees of the complainant.

The appellants, the defendants below, namely, the lot owner, Dilley, and the Kankakee Individual Mausoleum Company, assert a very bold proposition in their brief known therein as No. II, which is as follows: "He", that is the lot owner, "is not bound by any regulations passed subsequent to his purchase of the lot except regulations directed to the protection of the health, comfort, safety and welfare of the public, or regulations passed under a reserved power." The regulations in this case are not of this character. Excepting Ritchey vs. City of Canton, 46 Ill. App. 135, none of the cases cited by appellants bear out or support that proposition. The other cases exclusive of the Ritchey case, involve the question of the burial of negroes, or the right of the cemetery association to take a rule that no agent or servant of the lot owner may tend to graves. There is nothing in any of those opinions stating or in any way supporting the proposition that cemetery directors cannot subsequent to the purchase of a lot, make any rules which are not for the protection

within the provisions of rule 1. The private tombs or mausoleums of any kind extending above ground have been erected or constructed in the cemetery since 1904. Two substantial and well built mausoleums of stone were erected in 1880. In 1887 a mausoleum of granite and cement blocks was erected in the cemetery with the permission of the cemetery directors. Arthur H. Plante, the superintendent, testified that in 1881 or 1880 three vaults, each with a large stone, such as a flag stone and about six inches thick, over the tops were placed in the cemetery; the tops are not covered with dirt and extend above the ground. The sides of two of these vaults are made of Kanawhee limestone and the sides of the other is made of brick. These vaults contain bodies, but whether they are in crypts hermetically sealed, as alleged in the bill, does not appear in the evidence. The bill alleges, and the answers admit, that all constructions of vaults and other containers placed in the cemetery for the burial of the dead, and all interments in the same, have been under the supervision, direction and control of the officers and employees of the board of trustees.

The appellants, the respondents below, namely, the lot owner, Dillie, and the Kanawhee Limestone Company, assert a very bold proposition in their brief known therein as No. 11, which is as follows: "11st, that is the lot owner, 'is not bound by any regulations passed subsequent to his purchase of the lot except regulations directed to the protection of the health, comfort, safety and welfare of the public, or regulations passed under a reserved power.' The regulations in this case are not of this character. Therefore Richey vs. City of Salt Lake, 48 Ill. App. 188, none of the cases cited by appellants bear out or support that proposition. The other cases exclusive of the Richey case, involve the question of the burial of negroes, or the right of the cemetery association to take a wife that no agent or servant of the lot owner may tend to travel. There is nothing in any of these opinions stating or in any way supporting the proposition that cemetery directors cannot consent to the purchase of a lot, make any rules which are not for the protection

of the health, comfort, safety and welfare of the public. Appellants do not in their argument quote or point out any such words or anything from which such a rule or doctrine can be deducted. We find nothing in the cases or books, except that the rules must be reasonable, equal in operation and uniform in application to all lot owners in the cemetery.

The decision of this court according to the proposition of appellant would be a novel one. Can it be justified by the Ritchey case? In the Ritchey case a lot owner bought his lot before the City of Canton became the owner of the cemetery. The city by ordinance restricted the right to dig graves to the sexton. The opinion in that case states that the lot is within the city limits. Further on the opinion states that the title of the lot owner is subject to the exercise on the part of the city of that inherent and plenary power resting in the State, and by the State delegated to the city, to prohibit all things harmful to the health, comfort, safety, and welfare of the inhabitants of the city. The court held that the power of the city to regulate by ordinance the use and the manner of use of the burial lots by persons purchasing from the city after the adoption of such ordinances does not apply to the lot owner except to the extent that the provisions of the ordinance are directed to the protection of the health, comfort, safety and welfare of the public, because the lot owner was the owner of the lot before the city became the owner of the cemetery. Exactly on what grounds this holding is founded, we cannot say. It seems that a city has power to pass ordinances directed to the protection of the health, comfort, safety, and welfare of the public, and such ordinance it can pass regardless of when the lot owner obtained title to his lot. And the court seemed to think that there was no inherent power of the city to enact an ordinance of a different character, at least after a lot had been purchased.

Can it be said that a private cemetery corporation has no power to adopt rules and regulations except such as are for the health, comfort, safety and welfare of the public? A cemetery association is not a public corporation, nor quasi-public corporation

of the health, comfort, safety and welfare of the public. A city is not in their argument a rule or decision can be deduced. We find nothing in the cases at hand, except that the rule must be reasonable, equal in operation and uniform in application to all lot owners in the city.

The decision of this court according to the proposition of appellant would be a novel one. Can it be justified by the Ritchey case? In the Ritchey case a lot owner bought his lot before the City of Canton became the owner of the city. The city by ordinance restricted the right to dig mines to the surface. The opinion in that case states that the lot is within the city limits. Further on the opinion states that the title of the lot owner is subject to the exercise on the part of the city of that inherent and glorious power resting in the State, and by the State delegated to the city, to prohibit all things harmful to the health, comfort, safety, and welfare of the inhabitants of the city. The court held that the power of the city to regulate by ordinance the use and the manner of use of the burial lots by persons transferring from the city after the adoption of such ordinance does not apply to the lot owner except to the extent that the provisions of the ordinance are directed to the protection of the health, comfort, safety and welfare of the public, because the lot owner was the owner of the lot before the city became the owner of the cemetery. Exactly on that ground the holding is founded, we cannot say. It seems that a city has power to pass ordinances directed to the protection of the health, comfort, safety, and welfare of the public, and such ordinance is not unreasonable if when the lot owner obtained title to his lot. And the court seemed to think that there was no inherent power of the city to enact an ordinance of a different character, at least after a lot had been purchased.

But it is said that a private cemetery corporation has no power to adopt rules and regulations except such as are for the health, comfort, safety and welfare of the public. A cemetery corporation is not a public corporation, nor quasi-public corporation.

power to adopt rules and regulations except such as are for the health, comfort, safety and welfare of the public. A cemetery corporation is not a public corporation, nor quasi-public corporation.

and it has very little to do with the public. The People vs. Cemetery Co., 258 Ill. 36. Not a case is cited in the Ritchey case to uphold or lay down the rule that a private corporation cannot make reasonable rules for the regulation of the cemetery after the execution of the deed to the lot owner. We do not see how it can be said that a cemetery association must look to, or is confined to, the safety, comfort, health and welfare of the public in adopting rules and regulations for the burial of the dead in a cemetery. The directors do not represent the public. They have no delegated powers from the State to be exercised for the health, comfort, etc., of the public.

The appellant cites Scott vs. Lakewood Cemetery Association, 208 N. W. 811, which holds that a rule requiring lot owners to employ only employees of the association to care for and decorate the graves was unreasonable and an unlawful restriction on the lot owners rights. This case in no way upholds the doctrine which appellants deduce from the Ritchey case. In fact the court in the Scott case holds that cemetery directors may make reasonable rules, and in that case the court is speaking in a case where the rule above stated was passed after the lot owner had purchased his deed. In regard to the Ritchey case that court said: "In the Virginia and Georgia cases, explained in the opinion of the Scott case, a rule requiring that the digging and refilling of the graves shall be done only by employees of the association was sustained. In Ritchey vs. City of Canton, 46 Ill. App., 185, however, it was held that such a rule cannot be enforced against one who had purchased his lot before the rule was adopted." Curiously enough, the decision then goes on, as shown in the next quotation, to contradict it seems, the Ritchey case, as interpreted by appellants as follows: "The duty to maintain the cemetery in a sanitary condition may justify a requirement that graves be dug and re-filled only by employees of the association, but that question is not involved in this case." The court further says: "Of course the association may require that marking and decorating the graves must be of a character and be performed in a manner to conform with the general

and it has very little to do with the public. The people vs. cemetery
201 Ill. 32. Not a case is cited in the litany case to uphold
on law that the rule that a private corporation cannot make reason-
able rules for the regulation of the cemetery after the execution
of the deed to the lot owner. We do not see how it can be said that
cemetery association was look to, or is confined to, the safety,
comfort, health and welfare of the public in adopting rules and
regulations for the burial of the dead in a cemetery. The directors
do not represent the public. They have no delegated powers from
the state to be exercised for the health, comfort, etc., of the public.
The appellant cites Scott v. Baker & Cemetery Association,
208 N. W. 2d, which holds that a rule requiring lot owners to employ
only employees of the association to care for and decorate the
groves was unreasonable and an unlawful restriction on the lot
owners' rights. This case in no way upholds the doctrine which appellant
derives from the litany case. In fact the court in the Scott case holds
that cemetery directors may make reasonable rules, and in that
case the court is speaking in a case where the rule above stated
was passed after the lot owner had purchased his dead. In regard
to the litany case that court said: "In the Virginia and Georgia
cases, explained in the opinion of the Scott case, a rule re-
quiring that the digging and refilling of the groves shall be done
only by employees of the association was sustained. In litany
vs. City of London, 48 Ill. App. 2d, 195, however, it was held that
such a rule cannot be enforced against one who had purchased his
lot before the rule was adopted." Obviously enough, the decision
then goes on, as shown in the next quotation, to contrast it
with the litany case, as interpreted by appellant as follows:
"The duty to maintain the cemetery in a sanitary condition may
justify a regulation that groves be dug and refilled only by
employees of the association, but that question is not involved in
this case." The court further says: "Of course the association may
regulate that digging and decorating the groves must be of a
character and be performed in a manner to conform with the general

plan for improving and beautifying the cemetery and may adopt and enforce such reasonable rules as may be necessary or proper to accomplish that object and to protect the cemetery and the lots, graves and decorations therein from injury. The cemetery may regulate the exercise of the rights possessed by the lot owner, but it cannot prohibit him from exercising the right to have his lot cared for and decorated by persons of his own choosing, because what a man may do himself, he may do so by his agent."

When it comes to saying that a lot owner has title in fee simple and therefore his rights are increased, it is doubtful if this is supported by the Illinois cases. In Rosehill Cemetery Company vs. Hopkinson, 114 Ill., 209, the court held a lot owner under his deed has a fee simple title. However/ⁱⁿ McWhirter vs. Newell, 200 Ill. 583, the court holds that the sale of lots in a public cemetery does not pass title in fee but assures to the grantee an easement for burial purposes so long as the ~~gan~~ ground is used for a cemetery and this easement passes to the grantee's family at his death. This latter case is cited in 246 Ill. 241; 284 Ill. 291; 38 Red (2nd) 954 on the above proposition. In the Ritchey case it is held that whether or not a lot owner has title in fee simple his ownership is subject to reasonable rules and regulations.

The appellants cite the case of Rosehill Cemetery vs. Hopkinson, 114 Ill. 209, as a case "almost squarely on all fours with the instant case." However, in that case the rule against erecting a vault was found in the deed of the defendant, and there was no general rule of the cemetery prohibiting the erection of vaults. The court points out the distinction between a rule prohibiting the erection of a vault and a rule requiring the permission of the directors to erect a vault, and that the plans therefor must be submitted to the directors. It was held the rule discriminated against the lot owner, not that a general rule of that character was unreasonable or illegal or in derogation of the deed.

When the language is permissive the cemetery and not the lot owner and enforce such reasonable rules as may be necessary or proper to accomplish that object and to protect the cemetery and the lots, graves and decorations therein from injury. The cemetery may regulate the exercise of the rights possessed by the lot owner, but it cannot prohibit him from exercising the right to have his lot cared for and decorated by persons of his own choosing, because what a man may do himself, he may do so by his agent."

When it comes to saying that a lot owner has title in fee simple and therefore his rights are increased, it is doubtful if this is supported by the Illinois cases. In Harrell Cemetery Company v. Harrell, 100 Ill. 583, the court held a lot owner under his deed has a fee simple title. However, in Harrell v. Harrell, 100 Ill. 583, the court holds that the sale of lots in a public cemetery does not pass title in fee but amounts to the exercise of an easement for burial purposes so long as the grave ground is used for a cemetery and this easement passes to the grantee's family at his death. This latter case is cited in 208 Ill. 281; 284 Ill. 281; 28 Med (2nd) 284 on the above proposition. In the Witchey case it is held that whether or not a lot owner has title in fee simple his ownership is subject to reasonable rules and regulations.

The appellants cite the case of Harrell Cemetery Co. v. Harrell, 100 Ill. 583, as a case "almost entirely on all fours with the instant case." However, it is not the rule against exaction a verdict was found in the favor of the defendant, and there was no general rule of the cemetery prohibiting the erection of vaults. The court points out the distinction between a rule prohibiting the erection of a vault and a rule regarding the regulation of the directors to erect a vault, and that the latter was held to be advisory to the directors. It was held the rule discriminated against the lot owner, but that a general rule of that character was reasonable or illegal or in violation of the deed.

All tombs and receptacles for the dead including their interment therein, of the complainant were made under the permission and direction of the cemetery directors according to the allegations of the bill and the admissions in the answers, so the actions of the directors in allowing their installation has not been inconsistent with the rule No. 1. Rule No. 1 seems reasonable and in fact necessary. We cannot say it is in derogation of Dilley's deed which conveyed his lot restricted to cemetery purposes. Surely it could not be said he could build any form of mausoleum on his lot that he saw fit, such as wood, or other material that would soon deteriorate, and the directors would be restricted to the condition that they could not prevent such a structure unless its prevention was for the public's comfort, health, safety and welfare. Under his deed he had a right to bury and the cemetery could not stop burial of members of his family. This would be in derogation of his deed. He had a right to bury and erect mounds and monuments according to the custom of the neighborhood at the time he got his deed. The custom then was graves in the ground with sod on top, vaults and mausoleums built under the control and direction of the cemetery directors, as far as appears in the record. Why does not Dilley have to build with the permission, direction and control of the directors? He says in his answer that he is willing to do so and will leave the installation of the mausoleum to the direction and control of the directors. Are we to interfere with the discretion of the directors in enforcing Rule 1? Before this is done it must appear that they act in bad faith, oppressively, discriminate against Dilley, or in an arbitrary manner.

The evidence whether the mausoleum is durable and whether its joints will open when subjected to the action of the elements as alleged in the bill is in conflict. The Chancellor found the issues of fact and law in favor of the complainant. His findings should not be reversed unless palpable error has been committed. (City of Sand Co. v. Githens, 200 Ill. 268.) We cannot say his

All funds and receipts for the dead including their interest therein, of the corporation were made under the provisions and direction of the cemetery directors according to the allegations of the bill and the admissions in the answer, so the actions of the directors in allowing their installation was not been inconsistent with the rule No. 1. Rule No. 1 seems reasonable and in fact necessary. We cannot say it is in derogation of Diller's dead which conveyed his lot restricted to cemetery purposes. Surely it could not be said he could build any form of mausoleum on his lot that he saw fit, such as wood, or other material that would soon deteriorate, and the directors would be restricted to the condition that they could not prevent such a structure unless its prevention was for the public's comfort, health, safety and welfare. Under his dead he had a right to bury and the cemetery could not stop burial of members of his family. This would be in derogation of his dead. He had a right to bury and erect mausoleums and monuments according to the custom of the neighborhood at the time he got his dead. The custom then was graves in the ground with sod on top, vaults and mausoleums built under the control and direction of the cemetery directors, as far as appears in the record. Why does not Diller have to build with the permission, direction and control of the directors? He says in his answer that he is willing to do so and will leave the installation of the mausoleum to the directors and control of the directors. Are we to interfere with the direction of the directors in enforcing rule 1? Before this is done it must appear that they act in bad faith, oppressively, discriminate against Diller, or in an arbitrary manner. The evidence that the mausoleum is durable and weather its joints will open when subjected to the action of the elements as alleged in the bill is in conflict. The objection found the issue of fact and law in favor of the complainant. His findings should not be reversed unless a material error has been committed. (City of Sand Co. v. Citizens, 200 Ill. 238.) We cannot say this

finding of facts is against the manifest weight of the evidence. The evidence does not show that the directors of the cemetery association have acted in bad faith, or arbitrarily, or in a discriminating manner against the defendants. We are of the opinion that their discretion in enforcing the rules and regulations of their association should not be interfered with.

We find no reversible error in the case and the judgment of the circuit court of Kankakee County is hereby affirmed.

Affirmed.

...of fact is against the weight of the evidence.
The evidence does not show that the directors of the company
association have acted in bad faith, or arbitrarily, or in a
discriminating manner against the defendants. We are of the opinion
that their discretion in enforcing the rules and regulations of
their association should not be interfered with.
We find no reversible error in the case and the judgment
of the circuit court of Kanawha County is hereby affirmed.

Affirmed.

STATE OF ILLINOIS.

SECOND DISTRICT

} ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and thirty-_____

Clerk of the Appellate Court

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the second day of February, in
the year of our Lord one thousand nine hundred and thirty-two,
within and for the Second District of the State of Illinois:
Present--The Hon. THOMAS M. JETT, Presiding Justice.

Hon. FRED G. WOLFE, Justice.

Hon. JAMES S. BALDWIN, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff. /

265 I.A. 614²

BE IT REMEMBERED, that afterwards, to-wit: On

FEB 18 1932 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

In the Appellate Court of Illinois

Second District

October Term, A. D. 1931

Max Englestein, doing business
as the Peoples Store

appellant,

vs.

Iren Neitinger

appellee,

Appeal from the County Court
of Winnebago County.

WOLFE, J:

This is a case in which the appellant sued in the Justice of the Peace Court on a claim for merchandise sold and delivered to the appellee. From the judgment rendered against her in that court, the appellee took her appeal to the County Court. There the liability and the correctness of the account were not challenged by the appellee, but the appellee filed, at the beginning of the suit, her notice of set-off and counter-claim for the amount of money paid the appellant in settlement of a fire loss, in which the fur coat belonging to the appellee was destroyed at the appellant's store, while the coat was in the appellant's store for repair without charge. There is a serious conflict in the evidence between the appellant and the witnesses for the appellee as to whether any money was allowed appellant by the insurance company in settlement of the fire loss for customers' goods left for storage or repair. A verdict was found for the appellee in the sum of Forty-five and 55/100 Dollars (\$45.55) and costs of suit, from which the appellant takes his appeal to this court.

The only question in dispute in this case is whether the appellant received any money from the insurance company for the loss of the fur coat while it was in the possession of the appellant.

In the Appellate Court of Illinois
Second District
October Term, A. D. 1931

Max Weinstein, doing business
as the Peoples Store

Appellant,

Appeal from the County Court
of Winnebago County.

vs.

Irene Weinstiner

Appellee.

WOLFE, J.:

This is a case in which the appellant sued in the Justice of the Peace Court on a claim for merchandise sold and delivered to the appellee. From the judgment rendered against her in that court, the appellee took her appeal to the County Court. There the liability and the correctness of the account were not challenged by the appellee, but the appellee filed, at the beginning of the suit, her notice of set-off and counter-claim for the amount of money paid the appellant in settlement of a fire loss, in which the fire cost belonging to the appellee was destroyed at the appellant's store, while the cost was in the appellant's store for repairs without charge. There is a serious conflict in the evidence between the appellant and the appellee for the appellee as to whether any money was allowed appellant by the insurance company in settlement of the fire loss for customers' goods left for storage or repair. A verdict was found for the appellee in the sum of forty-five and 55/100 dollars (\$45.55) and costs of suit, from which the appellant takes his appeal to this court. The only question in dispute in this case is whether the appellant received any money from the insurance company for the loss of the goods while it was in the possession of the appellee.

The jury decided that issue in favor of the appellee and we think that an examination of the record discloses that they were justified from the evidence in finding that the appellant had received pay from the insurance company for the loss by fire of this coat.

Objection is made to some of the instructions that were given by the court on behalf of the appellee, but taking instructions as a series we think the jury was properly instructed, relative to the law applicable to the facts in this case. We do not see how the jury, under the evidence in this case, could come to any other reasonable conclusion than the one they did, and in such case the court would not reverse the judgment of the lower court even if the instructions were not technically correct. We think that the evidence discloses that the appellant collected from the insurance company the sum of \$87.50 on the coat in question, and that the appellee was entitled to this amount from the appellant less the undisputed amount of the claim of \$40.95 that the appellee owed the appellant.

The judgment of the County Court of Winnebago County is hereby affirmed.

Judgment affirmed.

The jury decided that issue in favor of the appellee and we think that an examination of the record discloses that they were justified from the evidence in finding that the appellant had recovered from the insurance company for the loss by fire of this boat. Objection is made to some of the instructions that were given by the court on behalf of the appellee, but asking instructions as a series we think the jury was properly instructed, relative to the law applicable to the facts in this case, we do not see how the jury, under the evidence in this case, could come to any other reasonable conclusion than the one they did, and in such case the court would not reverse the judgment of the lower court even if the instructions were not technically correct. We think that the evidence discloses that the appellant collected from the insurance company the sum of \$7.50 on the boat in question, and that the appellee was entitled to this amount from the appellant less the unpaid amount of the claim of \$4.95 that the appellee owed the appellant. The judgment of the County Court of Kingsburg County is hereby affirmed. Judgment affirmed.

STATE OF ILLINOIS.

SECOND DISTRICT

} ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and thirty-_____

Clerk of the Appellate Court

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the second day of February, in the year of our Lord one thousand nine hundred and thirty-two, within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.

Hon. FRED G. WOLFE, Justice.

Hon. JAMES S. BALDWIN, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff. ✓

265 I.A. 614³

BE IT REMEMBERED, that afterwards, to-wit: On

FEB 18 1932 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Czilli Czecz

appellee

vs.

Appeal from Circuit Court

The New Eza Association, a
Corporation, organized and doing
business under the laws of the
State of Michigan

of Kane County.

appellant

PER CURIAM:

A rehearing having been granted in the above entitled cause, and the case coming on to be heard on the petition for a rehearing together with the briefs and abstracts on file and after considering the case and on examination of the opinion heretofore filed herein, we have re-adopted and approved the opinion previously filed, and the judgment is reversed and the cause remanded.

Bill Cases

appeals

vs.

Appeal from Circuit Court

of Kane County.

The New Era Association, a

Corporation, organized and doing

business under the laws of the

State of Michigan

appellant

PER CURIAM:

A rehearing having been granted in the above entitled case, and the case coming on to be heard on the petition for a rehearing together with the briefs and objections on file and after considering the case and on examination of the opinion heretofore filed herein, we have re-argued and approved the opinion previously filed, and the judgment is reversed and the cause remanded.

STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and thirty-_____

Clerk of the Appellate Court



)
Czilli Czecz, appellee, v. The New Era Association, ap-
pellant. Gen. No.8,298.

*Justice to deliver on final verdict
and grant for plaintiffs*

Appeal from the ~~Municipal Court of Chicago;~~
~~Superior Court of Cook county;~~
Circuit Court of *Rock* county;
County Court of ~~county;~~
the Hon. ~~the~~ *division of*, Judge, presiding. Heard

~~the~~ this court for the first district at the term,

~~Affirmed.~~
~~Reversed~~
Reversed and remanded with directions.

Opinion filed *March 5, 1931* Rehearing denied

for appellants.

~~for plaintiffs in error.~~

for appellees.

~~for defendants in error.~~

PRESIDING JUSTICE

Gett → delivered the opinion of the court.

BE IT REMEMBERED, that afterwards, to-wit: On

MAR 5 1931 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the Third day of February, in
the year of our Lord one thousand nine hundred and thirty-one,
within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.

Hon. NORMAN L. JONES, Justice.

Hon. FRANKLIN H. BOGGS, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

265 I.A. 614⁴

BE IT REMEMBERED, that afterwards, to-wit: On

MAR 5 1931 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

Czilli Czeecz

Appellee,

vs.

Appeal from the Circuit Court

The New Era Association, a
Corporation, organized and
doing business under the
laws of the State of Michigan

of Kane County.

Appellant,

JETT, P. J.

This suit was brought by Czilli Czeecz, appellee, in the Circuit Court of Kane County against the New Era Association, a corporation, organized and doing business under the laws of the State of Michigan, appellant, to recover on a benefit certificate. A jury was waived and a trial was had by the court without the intervention of a jury. The Court found in favor of appellee in the sum of \$2000.00. Motion in arrest of judgment was denied and judgment was rendered against appellant for the sum of \$2000.00 and costs of suit and this appeal followed.

The declaration consists of two counts. The first count avers that on April 20th, 1926, a certificate of insurance was issued and delivered on the life of Joseph Czeecz, husband of appellee; avers performance of the conditions of the certificate, the death of said Joseph Czeecz and damages.

The second count of the declaration incorporates the certificate set out in the first count in addition to the usual averments and avers that notice of the death of said assured was filed with the appellant association within one year from the date of the death of said Joseph Czeecz; that thereupon said appellant accepted and acted upon said notice and acknowledged its sufficiency but denied liability because the claim was not on its face a valid claim and notified the said appellee of the action of the cabinet on said claim as presented by said appellee, by a letter, dated the 19th

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costs of sale and this amount follows.

Judgment was rendered against a plaintiff for the sum of \$200.00 and the sum of \$200.00. Motion is granted in favor of defendant and costs and indemnification of a jury. The court found in favor of plaintiff in a jury was waived and a trial was had by the court without the state of Utah and, accordingly, to recover on a plaintiff's declaration. a corporation, organized and doing business under the laws of the United States of America, against the sum of \$200.00 and costs of sale and this amount follows.

The document consists of two parts. The first part is a letter from the author to the editor of the journal, dated 1950, in which the author discusses the importance of the work and the need for a more systematic approach to the study of the subject. The second part is a list of references, which includes works by other authors in the field, as well as the author's own previous work.

[illegible]

day of December, 1927, addressed to the said appellee wherein it was stated that said claim had been presented to the appellant association and that the cabinet had passed a resolution that said claim was not on its face a valid claim and that the general secretary of said appellant was instructed on behalf of the cabinet to notify said claimant of her right to appear before said cabinet either in person or by attorneys within sixty days after mailing of notice to present such evidence as she might have to establish the validity of said claim. Said second count further avers that the appellant claims and pretends that it is not liable on said benefit certificate for the claim of appellee but appellee avers that the said appellant is liable in the sum of \$2000.00.

To the declaration the appellant pleaded the general issue and two special pleas. The first special plea was pleaded to the first count of the declaration which among other things averred that said appellant was a fraternal benefit association and the certificate declared upon was issued upon the written application of the said Joseph Czeck in which said Joseph Czeck agreed and consented that said application in all its parts, together with the by-laws of said appellant association then in force and those which should thereafter be legally enacted, should form the basis of his membership in said association. Said plea further averred that said Joseph Czeck came to his death through a conspiracy between the said Czilli Czeck, appellee, and one Peter Seres, wherein said Joseph Czeck would become intoxicated through the efforts of said appellee and the said Peter Seres would then get in a quarrel and fight with the said Joseph Czeck and he would thereby be killed. Upon this ground appellant disclaimed liability.

The second special plea, being the third plea in number, goes to the second count of the declaration and avers that at the time of the death of said Joseph Czeck there was in full force and effect a by-law of said association which provided that the cabinet

that on December, 1967, announced by the said appellant therein is
and stated that said claim had been presented to the appellant
association and that the appellant had received a communication that said
claim was not on its face a valid claim and that the appellant there-
fore of said appellant was threatened on behalf of the appellant to
refuse said claimant of her right to represent herself with respect
therein in person or by attorney within sixty days after mailing
of notice to present such evidence as the claimant may be submitting
the validity of said claim. Said second communication stated that
the appellant claimed and requested that it be not liable on said
benefit certificate for the claim of applicant for annuities from
that the said applicant in this is the sum of \$1000.00.
The appellant has a written demand for payment of the
and the appellant. The first communication was directed to
the first count of the declaration which reads, "other than
over and that said applicant was a legitimate beneficiary of a declaration and
the certificate declared that was issued upon the written application
at the said time when in which said claimant was not and was
noted that said applicant in all the years, together with the
policy of said appellant association that in terms and those which
should therefore be legally enforceable, should have the benefit of the
membership in said association. All other parties should have
said benefit from said in the terms thereof a contract between
the said claimant, applicant, and the said association, should have
therein stated that the said association should be liable to said
applicant and the said association should be liable to the said
claimant with the said benefit from and to which the said applicant is entitled.
The said applicant claimed liability.
The second count of the declaration reads, "other than
that on the second count of the declaration and that the
that on the basis of said second count there was in full force and
effect a policy of said association which provided for the payment

of the said association should pass upon all death claims and if, in its judgment, any such claim presented was not, on its face, a valid claim the cabinet should so notify the claimant and give her or her attorney an opportunity to appear before the cabinet within ⁶⁰~~sixty~~ days after the mailing of such notice and present such evidence as they might have to establish the validity of such claim, and the final decision of the cabinet on any claim should be conclusive unless an appeal was taken as thereafter provided; that in case of a rejection of any claim by the cabinet, the claimant shall have an option, within thirty days after the mailing of the notice of such action, of appealing to the senate or to a board of arbitration consisting of five members, two to be appointed by the cabinet and two by the claimant, and these four to appoint a fifth member who should be the chairman of the board. If the claimant should so elect to apply to either the senate or a board of arbitration she should file with the general secretary within said thirty days notice in writing of such an appeal, stating whether such appeal is to the senate or board of arbitration, and in the absence of such written notice the right of appeal should be considered waived, and the action of the cabinet shall be final and conclusive. It is further set forth in said plea that in case of an appeal to a board of arbitration the decision of a majority of such board either rejecting such claim or allowing the same in whole or in part shall be final and conclusive; that should a majority of such board of arbitration fail to reach an agreement, as above, the claimant may within 30 days thereafter, appeal to the senate by filing with the general secretary in writing a claim of such appeal. It is further charged that the by-laws provide that no suit at law or in equity should be commenced or maintained by any member or beneficiary against the association unless and until said member or beneficiary should have first followed the procedure and exhausted all remedies provided for and laid down by the laws of the association. And the said special plea further avers

[illegible]

that the said beneficiary, Czilli Czeecz, under the benefit certificate so issued to said Joseph Czeecz presented her claim to the said appellant association and it was duly submitted according to the by-laws of the association to the cabinet of the association and the said cabinet found said claim so submitted to be in its judgment on its face not a valid claim and the said appellee was so notified by said cabinet and also notified of her right to appear before said cabinet within sixty days after mailing of such notice and present such evidence as she might have to establish the validity of her said claim. Said plea further avers that said claimant wholly neglected to appear before said cabinet within sixty days and present evidence establishing the validity of her said claim, and the cabinet had decided that said claim was in its judgment not a valid claim and rejected the same. It is further averred that the appellee has taken no appeal from the decision of said cabinet and said decision still stands a final adjudication according to the contract of the said parties thereto.

The appellee filed a similiter to the general issue. To the second plea appellee filed a demurrer assigning as special cause of demurrer that the allegations of the appellant in its said special plea as to the conspiracy pursuant to which the said Joseph Czeecz was alleged to have been killed was argumentative and states conclusions of the pleader and that the appellee could not join issue thereon.

The second special cause of demurrer setforth to the second plea is that the allegations in said plea concerning said conspiracy states a conclusion of the pleader and does not setforth the facts showing the conspiracy or that the appellee caused the death of the said Joseph Czeecz.

To

The the second special plea appellee demurred assigning as special cause of demurrer, first, that the alleged provisions of the by-laws of the association were inconsistent with the provisions of the policy of insurance setforth in the declaration; second, that the provisions of said policy provide and contemplate that the

member, Joseph Czeez, should comply with the conditions, constitution and by-laws and not the plaintiff; third, that the said by-laws set forth in said plea and the provisions thereof imposed an unreasonable and illegal burden on appellee by requiring her to appear in person before the cabinet and by an unreasonable construction of the said by-laws with reference to giving appellee notice of furnishing further evidence, the appellant waived any further steps or proceedings pursuant to said by-laws and was estopped to rely thereon.

The court sustained the demurrer to the special pleas filed by the appellant. The principal ground relied upon by the appellant for a reversal of said judgment is the ruling of the court in sustaining the demurrers to the said special pleas.

We have examined the first special plea filed by the appellant and we are of the opinion that the court did not err in sustaining the demurrer thereto. The plea is argumentative and fails to set forth the facts upon which is based its alleged conspiracy.

A more serious question arises, however, as to the third plea. It is insisted by appellee that the plea is not a sufficient answer to the second count of the declaration which sets forth the giving of notice to appellant of her right to appear before the cabinet and present such evidence as she might have to establish the validity of such claim. It is further urged by appellee that the appellant having admitted of record that it had notified appellee that she should appear either in person or by attorney to furnish her additional evidence thereby put an unreasonable and unlawful construction upon the by-law, which it set forth in its plea and placed upon appellee a burden not warranted by said by-law and that said plea was no defense of or justification for the action of appellant in requiring appellee to appear before the cabinet in person or by attorney and for that reason the trial court properly sustained the demurrer of appellee.

It is the contention of appellee that the construction placed upon said by-law is warranted by the rule announced in *Benza v. the New Era Association*, 323 Ill. 297. In that case at pages 301-302, the court among other things said:

"The question arises here whether the by-law embraced

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in the plaintiff in error's additional plea is open to objection. It will be noted that it provides for appeal from the decision of the cabinet either to the senate or a board of arbitration, and in case a board of arbitration is chosen and decides against the claim an appeal to the senate is allowed. It is also provided that 'unless such appeal is taken, no suit at law or equity shall be commenced or maintained by any member or beneficiary against the association,' etc. This does not, as argued by counsel for the defendant in error, place the final determination of questions arising on benefit certificates solely in the hands of the society. It is only when the final tribunal is not appealed to that suit in the courts is by the contract waived. This is the contract of the parties, and any beneficiary may, by complying with the provisions of the by-laws, appeal to the courts from an unfavorable decision of the final tribunal of the society. This by-law, therefore, is not invalid for that reason.

Counsel for defendant in error argue that the provision of the by-law which provides that a beneficiary who is not satisfied with the action of the cabinet may appear before the cabinet and present such evidence as she may have to establish her claim is an unreasonable requirement, for the reason that either the claimant or her counsel must attend upon the meetings of the cabinet for the purpose of presenting such claim. So construed the by-law would be unreasonable in its provisions, but it is to be construed as permitting the filing of such additional evidence before the cabinet in writing, as proofs of death are filed, and cannot be said to require the presence of the applicant at the home office."

We are of the opinion that the provision in the by-law, in view of the holding of the Supreme Court, is not to be construed as requiring the appearance of the claimant in person or by attorney; that it permitted the filing of such evidence in writing before the cabinet as appellee might have with a view of sustaining her claim and that it did not require the presence of the applicant at the home office.

We conclude, therefore, that the by-law was not complied with and that the trial court erred in sustaining the demurrer to the said third plea and for that reason the judgment is reversed and the cause remanded.

Reversed and remanded.

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and twenty-_____

Clerk of the Appellate Court

437
AT A TERM OF THE APPELLATE COURT.

Begun and held at Ottawa, on Tuesday, the second day of February, in the year of our Lord one thousand nine hundred and thirty-two within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.

Hon. FRED G. WOLFE, Justice.

Hon. JAMES S. BALDWIN, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

265 I.A. 614⁵

BE IT REMEMBERED, that afterwards, to-wit: On

FEB 24 1932 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 8³56

No. 2

In the Appellate Court of Illinois

Second District

May Term, A. D. 1931.

The People of the State
of Illinois,

Defendant in Error

vs.

Writ of Error to County Court

Lee County.

Ray Null,

Plaintiff in Error

WOLFE, J:

The State's Attorney of Lee County filed an information in the County Court of said County, charging the defendant, Ray Null, with the violation of Section 24, Chapter 68 of Hurd's Revised Statutes. The information charges that the defendant, without legal excuse, failed, neglected and refused to provide for the support of his child, Marie Null, etc. The case was tried before a jury in said court which found the defendant guilty. The court sentenced the defendant to the county jail of Lee County, Illinois, for a period of ninety days, and in addition thereto, he was ordered to pay to Rachel Frerichs, an aunt of the said Marie Null, the sum of \$20.00 on the first day of March, A. D. 1931, and a like sum of \$20.00 on the first day of each month thereafter until further order of the court. The court appointed Rachel Frerichs trustee for the purpose of receiving such payments.

In addition to the above payments and sentence, the defendant was ordered to pay to said Rachel Frerichs, as such trustee, the sum of \$44.00, which was to be paid by the said Rachel Frerichs to the Dixon Public Hospital for the care and nursing of Marie Null during an operation for appendicitis in the month of October, 1931, and the defendant was further ordered

In the Appellate Court of Illinois

Second District

May Term, A. D. 1931.

The People of the State

of Illinois,

Defendant in Error

vs.

Ray Null,

Plaintiff in Error

WOLFE, J.

The State's Attorney of Lee County filed an information

in the County Court of said County, charging the defendant,

Ray Null, with the violation of Section 24, Chapter 88 of Hurd's Revised Statutes. The information charges that the defendant,

without legal excuse, failed, neglected and refused to provide for the support of his child, Marie Null, etc. The case was

tried before a jury in said court which found the defendant

guilty. The court sentenced the defendant to the county jail of Lee County, Illinois, for a period of ninety days, and in addi-

tion thereto, he was ordered to pay to Rachel Frierichs, an

amount of the said Marie Null, the sum of \$80.00 on the first day of March, A. D. 1931, and a like sum of \$80.00 on the first day

of each month thereafter until further order of the court. The

court appointed Rachel Frierichs trustee for the purpose of

receiving such payments.

In addition to the above payments and sentence, the

defendant was ordered to pay to said Rachel Frierichs, as such

trustee, the sum of \$44.00, which was to be paid by the said

Rachel Frierichs to the Dixon Public Hospital for the care and

nursing of Marie Null during an operation for appendicitis in

the month of October, 1931, and the defendant was further ordered

to pay \$135.00 to Dr. A. W. Chandler, and also to pay the costs of the suit.

Shortly after the death of the wife and mother of the children, the defendant Ray Null, took Marie, the oldest of his children to the home of her aunt, Rachel Frerichs, and the father asked Mrs. Frerichs if she would take Marie until he could find a home for her. At that time Mrs. Frerichs took the child and the defendant gave Mrs. Frerichs only \$25.00. The child has remained in the home of the Frerichs from that time down until the time of the hearing of this case. Her father has paid only \$10.00 towards the support or maintenance of said child since the time that he left her with the aunt, nearly six years before the time of the trial.

It is admitted that the aunt and uncle have properly cared for this child at all times since she has been with them at their home; that they have clothed, fed and educated her to the best of their ability.

The plaintiff in error contends that the judgment of the county court should be reversed because he did not abandon his daughter. The Statute provides that whoever neglects, or refuses to provide for the child who is in destitute circumstances, etc., shall be guilty of an offense, and we think the evidence clearly shows that fact that the plaintiff in error in this case neglected and refused to provide for his child for a period of approximately six years prior to the filing of this information. It is next contended that the defendant is not guilty, because the child was not in destitute and necessitous circumstances when the information was filed, but "on the contrary" - - quoting from his brief and argument, - "the evidence establishes without contradiction that this child for six years was maintained by Rachel Frerichs, her aunt, and Mrs. Frerichs, her uncle. The evidence shows that she was cared for, supported and maintained as well as the daughter of Mrs. and Mrs. Frerichs, well clothed,

to pay \$150.00 to Dr. A. W. Underler, and also to pay the costs of the suit.

Shortly after the death of the wife and mother of the children, the defendant Ray Noll, took Maria, the eldest of his children to the home of her aunt, Rachel Treichle, and the father asked Mrs. Treichle if she would take Maria until he could find a home for her. At that time Mrs. Treichle took the child and the defendant gave Mrs. Treichle only \$25.00. The child has remained in the home of the Treichles from that time down until the time of the hearing of this case. Her father has paid only \$10.00 towards the support or maintenance of said child since the time that he left her with the aunt, nearly six years before the time of the trial.

It is admitted that the aunt and uncle have properly cared for this child at all times since she has been with them at their home; that they have clothed, fed and educated her to the best of their ability.

The plaintiff in error contends that the judgment of the county court should be reversed because he did not abandon his daughter. The Statute provides that whoever neglects, or refuses to provide for the child who is in destitute circumstances, etc., shall be guilty of an offense, and we think the evidence clearly shows that fact that the plaintiff in error in this case neglected and refused to provide for his child for a period of approximately six years prior to the filing of this indictment. It is next contended that the defendant is not guilty, because the child was not in destitute and necessitous circumstances when the indictment was filed, but "on the contrary" - - - growing from his birth and upward, - - - the evidence establishes affirmatively that this child for six years was maintained by Rachel Treichle, her aunt, and Mrs. Treichle, her uncle. The evidence shows that she was cared for, supported and maintained as well as the daughter of her and Mrs. Treichle, well clothed,

well fed and well schooled." This is not denied. Plaintiff in error relies upon the case of People vs. Waddell, 247 App. 257 to maintain his contention. In this case, the parties were married in December, 1924, and in March 1926, the wife left her home without any reasonable cause, went to her parents where her child was born in September, 1926. The evidence shows that the wife had no funds or property of her own, and there was no showing that the child was in destitute and necessitous circumstances. Under the facts in that case, the court said the evidence was not sufficient to find the defendant guilty of child abandonment, but in the same opinion say "In a large measure each case depends upon and must be decided in the light of the peculiar facts incident thereto".

In the case of the People vs. House, 259 Ill. App. 27, the husband and wife never had lived together and the child was born at the home of the mother's parents. The court in reversing this case say, "that under the facts as proven, that the defendant was not guilty of child abandonment."

If the courts would follow the rule as contended for by the plaintiff in error, any man could leave his children to be taken care of by the public, or place them in some children's home, and if the children were well cared for by the public, or by some charitable institution, that would relieve him of the criminal responsibility of supporting his own child. This we cannot concede to be the intent of the legislature in passing this statute. We feel the rule is well stated in the case of People vs. Howell, 214 App. 372. "It avails the plaintiff in error nothing that the child is being cared for by its grand-parents. To a criminal prosecution for neglecting to support a child, it is no defense that the child did not suffer actual want, having been cared for by volunteers."

This case can be distinguished very clearly from the 247 (App.) and the 259 App. for the reason that in those cases the child was

well fed and well schooled." This is not denied. Plaintiff in error relies upon the case of *People vs. Howell*, 247 App. 237 to maintain his contention. In this case, the parties were married in December, 1934, and in March 1936, the wife left her home without any reasonable cause, went to her parents where her child was born in September, 1936. The evidence shows that the wife has no funds or property of her own, and there was no showing that the child was in destitute and necessitous circumstances. Under the facts in that case, the court said the evidence was not sufficient to find the defendant guilty of child abandonment, but in the same opinion say "in a large measure each case depends upon and must be decided in the light of the peculiar facts incident thereto".

In the case of *the People vs. Howe*, 225 Ill. App. 27, the husband and wife never had lived together and the child was born at the home of the mother's parents. The court in reversing this case say, "that under the facts as proven, that the defendant was not guilty of child abandonment."

If the courts would follow the rule as contended for by the plaintiff in error, any man could leave his children to be taken care of by the public, or place them in some children's home, and if the children were well cared for by the public, or by some charitable institution, that would relieve him of the original responsibility of supporting his own child. This we cannot concede to be the intent of the legislature in passing this statute. We feel the rule is well stated in the case of *People vs. Howell*, 244 App. 237. "It avails the plaintiff in error nothing that the child is being cared for by its grand-parents. To a criminal prosecution for neglecting to support a child, it is no defense that the child did not suffer actual want, having been cared for by volunteers."

This case can be distinguished very clearly from the 247 (App.) and the 225 App. for the reason that in those cases the child was

taken away from the father without his consent. In this case, the father by his own deliberate act, placed the child with the aunt and then neglected and refused to support the child for six years, depending upon the love and affection of the uncle and aunt had for their dead sister's child to furnish the child the necessities, that its own father neglected to give to the child.

One of the assignments of error is, that the court erred in rendering the judgment that it did. "First; because the court had no right to appoint a trustee to receive the payments. Second; that the court had no right to require a payment of \$20.00 a month, or to require the defendant to pay \$44.00 hospital bill; or to pay \$135.00 doctor's bill"; or to require a bond to secure payment of any of the amounts of money assessed against the defendant; the court erred in committing the defendant to jail for ninety days". We think that this assignment of errors should be sustained as the Statute provides for "a fine not to exceed \$600.00, or by imprisonment in the county jail, etc., not to exceed one year or both such fine and imprisonment." The Statute further provides, "that after the conviction, instead of imposing the penalty provided in this case, or in addition thereto, the court in his discretion * * * shall have the power to make an order which shall be * * * directing the defendant to pay a certain sum periodically for a term not to exceeding one year to the guardian * * * or to an individual approved by the court as trustee and to release the defendant upon bond and upon certain conditions. A part of this judgment we think is erroneous under the Statute. We think that the trial court had a right to sentence the defendant to jail for ninety days; and also had the right to require the defendant to pay \$20.00 per month for the support and maintenance of Marie Null, and had the authority to appoint Rachel Frerichs, the aunt of Marie Null as trustee to collect these payments. We find no authority that gave the judge the right to order the defendant to pay \$44.00 hospital bill, or the \$135.00

taken away from the father without his consent. In this case, the father by his own deliberate act, placed the child with the aunt and then neglected and refused to support the child for six years, depending upon the love and affection of the uncle and aunt for their dead sister's child to furnish the child the necessities, that the own father neglected to give to the child. One of the assignments of error is, that the court erred in rendering the judgment that it did. First, because the court had no right to appoint a trustee to receive the payments. Second, that the court had no right to require a payment of \$50.00 a month, or to require the defendant to pay \$44.00 hospital bill; or to pay \$135.00 doctor's bill; or to require a bond to secure payment of any of the amounts of money assessed against the defendant; the court erred in committing the defendant to jail for ninety days. We think that this assignment of error should be sustained as the Statute provides for "a fine not to exceed \$500.00, or by imprisonment in the county jail, etc., not to exceed one year or both such fine and imprisonment." The Statute further provides, "that after the conviction, instead of imposing the penalty provided in this case, or in addition thereto, the court in his discretion * * * shall have the power to make an order which shall be * * * directed to the defendant to pay a certain sum periodically for a term not to exceed one year to the trustee * * * or to an individual approved by the court as trustee and to release the defendant upon bond and upon certain conditions. A part of this judgment we think is erroneous under the Statute. We think that the trial court had a right to sentence the defendant to jail for ninety days; and also had the right to require the defendant to pay \$50.00 per month for the support and maintenance of Marie Wolf, and had the authority to appoint Joseph Freville, the aunt of Marie Wolf as trustee to collect these payments. We find no authority that gave the judge the right to order the defendant to pay \$44.00 hospital bill, or the \$135.00

doctor's bill, and we think the judgment in this respect is erroneous.'

There is a conflict in the authorities of the different states as to what is the best practice for the appellate court to pursue when an erroneous judgment has been entered by the trial judge and the case comes to the appellate court on review. Quite a number of states hold the proper practice to be to affirm the case on that part of the sentence that is legal and to reverse it as to the erroneous part of the judgment.' Our Supreme Court in the case of *Henderson vs. The People*, 105 Ill. 607, lays down the rule that the proper practice in such cases, is to reverse and remand the case to the trial court with directions to that court to enter a proper judgment upon the original verdict.' The same rule was laid down in the case of *the People vs. Boer*, 262 Ill 157.' These cases were followed in the case of *People vs. Clark*, 245 Appellate (Ill.) 316.'

It is the opinion of this court that the evidence sustains the verdict and there is no reversible error as to the trial of the case, and if the judgment had been correct, the case should be affirmed, but owing to the erroneous judgment, the case is hereby reversed and the cause remanded to the County Court of Lee County, Illinois, with leave to the State's Attorney of said County to move for directions to the Court to enter another and proper judgment upon the verdict and the sentence to be as the Statute in such case provides.' Reversed and remanded with directions.'

doctor's bill, and we think the judgment in this respect is erroneous.

There is a conflict in the authorities of the different states as to what is the best practice for the appellate court to pursue when an erroneous judgment has been entered by the trial judge and the case comes to the appellate court on review. Quite a number of states hold the proper practice to be to affirm the case on that part of the sentence that is legal and to reverse it as to the erroneous part of the judgment. Our Supreme Court in the case of *Henderson vs. The People*, 108 Ill. 607, lays down the rule that the proper practice in such cases, is to reverse and remand the case to the trial court with directions to that court to enter a proper judgment upon the original verdict. The same rule was laid down in the case of *The People vs. Boer*, 82 Ill. 187. These cases were followed in the case of *People vs.*

Clark, 245 Appellate (Ill.) 518.

It is the opinion of this court that the evidence sustains the verdict and there is no reversible error as to the trial of the case, and if the judgment had been correct, the case should be affirmed, but owing to the erroneous judgment, the case is hereby reversed and the cause remanded to the County Court of Lee County, Illinois, with leave to the State's Attorney of said County to move for directions to the Court to enter another and proper judgment upon the verdict and the sentence to be as the Statute in such case provides. Reversed and remanded with directions.

STATE OF ILLINOIS, }
SECOND DISTRICT } ss. I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in
and for said Second Distriet of the State of Illinois, and the keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the_____

of the said Appellate Court in the above entitled cause, of record in my office.
In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this_____day of
_____in the year of our Lord one thousand
nine hundred and twenty-_____

Clerk of the Appellate Court

447
AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the second day of February, in
the year of our Lord one thousand nine hundred and thirty-two,
within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.

Hon. FRED G. WOLFE, Justice.

Hon. JAMES S. BALDWIN, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff. /

265 I.A. 615¹

BE IT REMEMBERED, that afterwards, to-wit: On

FEB 24 1932

the opinion of the Court was filed in the

Clerk's office of said Court, in the words and figures

following, to-wit:

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

October Term, A.D. 1931.

Robert Jones, Administrator
of the Estate of Robert W.
Jones, Deceased,
Appellee

vs.

Appeal from the Circuit Court
of Peoria County.

Charles S. Mellen,
Appellant.

WOLFE, J:

Robert Jones, as administrator of the estate of Robert W. Jones, deceased, started suit in the Circuit Court of Peoria County, against Charles S. Mellen, to recover damage for the benefit of next of kin of the said Robert W. Jones, deceased, for the death of the said Robert W. Jones, alleged to have been caused by the negligence of Charles S. Mellen.

The declaration filed consists of five counts, in which it is charged in different language that the appellant, Charles S. Mellen was the owner of an automobile and operating the same on the 9th day of May, 1931; that he was driving the automobile on a public highway in a southerly direction within the corporate limits of the City of Peoria, Illinois, on what is commonly called and known as Adams Street; that while the deceased was, then and there rightfully upon said South Adams Street and in the exercise of due care and caution for his own safety, the defendant, then and there, so carelessly, negligently and recklessly, drove, run and operated said automobile, that the defendant, then and there caused said automobile with great force and violence to be run upon, against and strike said Robert W. Jones, deceased; that as a result of the negligence of said defendant Charles S. Mellen, in the manner and form aforesaid, the said Robert W. Jones, was then and there knocked

IN THE
COURT OF COMMONS
AT THE CITY OF LONDON

Before the Lord Mayor, Aldermen and Commoners

Robert Jones, Administrator
of the Estate of Robert J.
Jones, deceased,
Petitioner

Respondent from the Estate of Robert
J. Jones, deceased.

Charles J. Jones, Respondent.

Verdict, 1:

Robert Jones, as administrator of the estate of Robert
J. Jones, deceased, started with in the district court of
County, against Charles J. Jones, to recover damages for the
benefit of most of him of the said Robert J. Jones, deceased,
for the death of the said Robert J. Jones, alleged to have been
caused by the negligence of Charles J. Jones.
The declaration filed consisted of five counts, in which
it is charged in different language that the respondent, Charles J.
Jones was the owner of an automobile and operating the same on the
24th day of May, 1921; that he was driving the automobile on a public
highway in a northerly direction when the defendant killed the
plaintiff, Charles J. Jones, Illinois, and that the defendant was known as
Adam Adams; that while the deceased was, then and there, in the
highly upon said north road, and on the occasion of the same
and caution for his own safety, the defendant, then and there, so
carelessly, negligently and recklessly, drove, ran and operated said
automobile, that the defendant, then and there, caused said auto-
mobile with great force and violence to be run down, against and
strike said Robert J. Jones, deceased; that as a result of said
negligence of said defendant Charles J. Jones, in the manner and
form aforesaid, the said Robert J. Jones, was then and there

down to and upon the street, and by force of the impact of the said automobile, was then and there killed.

The second count, after the inducement, charges that the defendant was driving at a high and dangerous rate of speed. The third count charges that the defendant failed to give any warning by the sound of his automobile horn to the said Robert W. Jones of the approach of said automobile. The fourth count charges that the appellant failed to keep his automobile under safe and reasonable control and in consequence of such failure as a direct result of said misconduct of the defendant in that regard, he then and there ran, drove and operated his automobile upon and against the plaintiff's intestate with great force and violence, etc.

The fifth count charges that the defendant failed to keep a safe and proper lookout ahead for the appellee's intestate, etc.

To the declaration the appellant pleaded the general issue. Issue was joined and the case was submitted to a jury for trial, who found in favor of the appellee in the sum of \$2,000.00. Judgment was rendered on the verdict, to which the defendant properly excepted and brings the case to this court for review.

It appears from the evidence that on the afternoon of the day on which Robert W. Jones, deceased, sustained the injuries that resulted in his death, he, in company with six or seven other children, left his home and went to what is known as Meyer's drug store. This store is located at the corner of Sanger and South Adams Streets in the City of Peoria. Each of the children purchased some candy at the store. Robert W. Jones purchased two pieces, one of which was commonly called 'blow-gun.' This gum is red, round in shape, and about the size of a large marble. As the children left the drug store they turned the corner to go up Adams

down to and upon the witness, and by force of the impact of the said automobile, was then and there killed.

The second count, after the indictment, charges that

the defendant was driving at a high and dangerous rate of speed.

The third count charges that the defendant failed to give any warning by the sound of his automobile horn to the said Robert J. Jones

of the approach of said automobile. The fourth count charges that the witness failed to keep his automobile under such and such control and in consequence of such failure as almost resulted

of said mismanagement of the defendant in that regard, he then and there met, struck and operated his automobile upon and against the

plaintiff's intestate with great force and violence, etc.

The fifth count charges that the defendant failed to keep a safe and proper lookout ahead for the plaintiff's intestate, etc.

To the declaration the plaintiff pleaded the general

issue. Issue was joined and the same was submitted to a jury for trial, who found in favor of the plaintiff in the sum of \$2,000.00.

And, having been rendered on the verdict, to which the defendant properly excepted and assigns the case to this court for review.

It appears from the evidence that on the afternoon of the

day on which Robert J. Jones, deceased, was killed the plaintiff was traveling in his boat, in company with him or some other

children, left his home and went to work as usual on the day in question. This story is supported by the sworn testimony and holds

good against the story of Robert J. Jones. The children had passed some time at the office. Robert J. Jones purchased two

glasses, one of which was commonly called "flew-eyes". This was the red, round in shape, and about the size of a large apple. In the

children left the dock where they were in the corner to go up Adams

Street and were walking on the west side thereof on the sidewalk. Robert had gone a distance of approximately 35 or 40 feet when he dropped his 'blow-gum' which rolled off the sidewalk onto the pavement and stopped about three or four feet from the curbing. Robert stepped off of the sidewalk onto the pavement to recover his blow-gum and while in the act of picking it up, was struck on the head by the automobile of the defendant, Charles S. Mellen. The car in which the appellant was riding was being driven south on Adams Street. The force of the impact caused injuries to Robert W. Jones which caused his death, late in the evening of the day he received the injury.

At the trial, the plaintiff offered evidence tending to establish the facts as stated above and at the conclusion of the evidence the defendant, Mellen, through his attorney, offered a motion to have the jury instructed to find a verdict in his favor. This motion was denied. The defendant Mellen then offered evidence to sustain his contention that he was not guilty of any negligence which caused the death of Robert W. Jones. At the conclusion of all of the evidence again, he presented a motion for a directed verdict in his favor. This motion was also denied.

The only question presented to this court for review was whether at the time of the accident in question, the child, Robert W. Jones, now deceased, was in the exercise of reasonable care for his own safety, and whether the defendant, Charles W. Mellen was guilty of negligence which caused the death of the deceased.

The evidence established the fact that plaintiff's intestate was a child eight years of age, who had gone to a drug store with his playmates to buy some candy, and gum, as heretofore stated. That he received the injuries that caused his death by a collision with the doctor's car is not disputed. The evidence on the part of the plaintiff, now the appellee, is to the effect that at the time of the accident, or just prior thereto, Dr. Mellen was driving his car

at a rate of speed in the neighborhood of 45 miles per hour; that he passed three other automobiles that were in front of him in a short distance just prior to the time his automobile struck the child and caused his death. On the other hand it is the contention of the defendant Mellen that he was driving at a speed not in excess of 25 miles per hour; that he had no notice whatever that the child was going to leave the sidewalk, and that he did not strike the child, but the child ran into the side of the car, and was injured, and this injury caused the death of the child. The testimony of disinterested witnesses tends to strongly show that the child was struck by the front bumper of the car. It is readily seen that there is a conflict in the evidence as to what occurred.

Where the evidence is conflicting relative to a material fact in a case, it becomes the province of the jury, who are the judges of the credibility of the witnesses and the weight to be given to the testimony, to determine where the weight of the evidence lies. Where there is no error in the trial of a case and there is nothing in the record to show that the jury were actuated by passion, prejudice or partiality, then the reviewing court should not disturb that verdict unless they can say from an examination of the whole record that the jury's verdict was manifestly against the weight of the evidence. We cannot say that the verdict of the jury is manifestly against the weight of the evidence, and we can see no evidence of the jury being actuated by passion, prejudice or partiality.

The question of the negligence of Dr. Mellon and the question of contributory negligence of the little boy, were both questions of fact to be decided by the jury. They have found both of these issues of fact in favor of the plaintiff in the original suit, and we are of the opinion that that verdict should not be disturbed.

It is a well known fact that a child eight years old does not have the discretion and the exercise of ordinary prudence that a person of more mature years would exercise under the same circumstances. A person operating a motor vehicle along the public

at a rate of speed in the neighborhood of 20 miles per hour; that he passed some other automobiles that were in front of him in a short distance just prior to the time his automobile struck the child and caused its death. On the other hand it is the contention of the defendant's counsel that he was driving at a speed not in excess of 25 miles per hour; that he did not notice whatever that the child was going to leave the sidewalk, and that he did not strike the child, but the child ran into the side of the car, and was injured, and this injury caused the death of the child. The testimony of different witnesses tends to establish that the child was struck by the front bumper of the car. It is readily seen that there is a conflict in the evidence as to what occurred. Where the evidence is conflicting relative to a material fact in a case, it becomes the province of the jury, who are the judges of the credibility of the witnesses and the weight to be given to the testimony, to determine where the weight of the evidence lies. Where there is no error in the trial of a case and there is nothing in the record to show that the jury were actuated by passion, prejudice or partiality, then the reviewing court should not disturb that verdict unless they can say from an examination of the whole record that the jury's verdict was manifestly against the weight of the evidence. We cannot say that the verdict of the jury is manifestly against the weight of the evidence, and we can see no evidence of the jury being actuated by passion, prejudice or partiality. The question of the negligence of Mr. Nelson and the question of contributory negligence of the little boy, were both questions of fact to be decided by the jury. We have found from the testimony of fact in favor of the plaintiff in the original trial, and we are of the opinion that that verdict should not be disturbed.

It is well known that a child of five years of age does not have the discretion and the exercise of ordinary prudence that a person of more mature years would exercise under the same circumstances. A person operating a motor vehicle should be held

streets of a city is bound to recognize that children are likely to be playing in the street, and that they may sometimes step off of the sidewalk onto the pavement and that they may sometimes attempt to cross the street unmindful of danger. The driver of an automobile owes to such children the duty of reasonable and ordinary care for their safety and protection. The evidence tends to show that this was a busy street at the time the appellant was driving his car and caused the death of this child. He had passed three cars within less than a block of the place where the accident occurred, and we think the jury were justified in finding that at the time of the accident, the car was being operated at an excessive speed. Morrison vs. Flower, 30 Ill. 190; Ogden vs. Keck, 253 Ill. App. 444. A child of eight years of age will be held only to the degree of accountability that is in keeping with his age, experience and knowledge of things. The question of contributory negligence of this child should not be considered with the same strictness that it is in the case of adults when they are walking on our public streets.

There is no complaint relative to the instructions that were given or refused by the trial court so the issue here is purely a question of fact, which the jury decided in favor of the appellee. In our opinion the jury properly found the issues in favor of the original plaintiff and the judgment of the Circuit Court of Peoria County should be affirmed.

Judgment affirmed.

street of a city is bound to recognize that children are likely to be playing in the street, and that such play is a step off of the sidewalk onto the street and that such play is a step off attempt to cross the street without the aid of a driver or is responsible to him for the safety of the child. The evidence tends to show that this was a busy street at the time the accident was driving his car and caused the death of this child. He had passed three cars which were then a block of the place where the accident occurred, and he had seen the child in the line of traffic at the time of the accident, the car was being operated at an excessive speed. Morrison vs. Tower, 30 Ill. 190; Ogden vs. Lewis, 188 Ill. 444. A child of eight years of age will be held only to the duty of exercising the best of his ability in keeping within his lane, experience and knowledge of things. The question of contributory negligence of this child should not be considered with the same strictness that it is in the case of adults when they are walking on our public streets.

There is no evidence relative to the negligence of the child being given or retained by the child's parents at the time he was in the street, and the court is not bound to find in favor of the child. In our opinion the jury properly found the child in favor of the original plaintiff and the judgment of the circuit court of Cook County should be affirmed.

Respectfully,
J. Edgar Hoover

STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in
and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the _____

of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this _____ day of
_____ in the year of our Lord one thousand
nine hundred and twenty-_____

Clerk of the Appellate Court

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the second day of February, in
the year of our Lord one thousand nine hundred and thirty-two,
within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.

Hon. FRED G. WOLFE, Justice.

Hon. JAMES S. BALDWIN, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff. /

265 I.A. 615²

BE IT REMEMBERED, that afterwards, to-wit: On
FEB 2 1932 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

October Term, A. D. 1931

Lena Gill,
Appellee,

vs.

Appeal from the Circuit Court
of Knox County.

North American Union, a
corporation,
Appellant.

WOLFE, J:

Lena Gill, appellee herein, brought suit in the Circuit Court of Knox County, Illinois, on a fraternal beneficiary certificate issued by the appellant corporation to the deceased husband of Lena Gill, the certificate being for the sum of \$1,000.00. The declaration contained the ordinary allegations of such insurance policies, and in addition thereto alleged that appellant after the death of the insured issued and delivered its check to appellee in the sum of \$347.45 as payment in full of appellant's liability to appellee under the policy; that appellee then and there returned the check to the appellant; that the appellant thereby waived proof of death of the said insured, Robert G. Gill. The declaration further alleged that during his life time the insured kept and performed and complied with all the terms and conditions of the policy and alleged the death of the insured. The appellant pleaded the general issue and a special plea that the contract of insurance provided that in case of suicide, the appellant should only be liable for such sum as the insured had paid to the appellant in assessments, that the insured did commit suicide, and that the appellant was liable only for the amount of the assessments that had been paid.

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and that the applicant was liable only for the amount of the insured
two applicant in circumstances, that he insured the same/ value,
should only be liable for said sum as the insured had paid for
of insurance provided that in case of accident, the applicant
placed the General Insuree and a General Agent for the contract
policy and alleged the death of the insured. The applicant
performed and complied with all the terms and conditions of the
contract alleged that during the life time the insured kept and
of death of the said insured, Robert W. Hill. The destination
the check to the applicant; that the applicant thereby received money
applied under the policy; that applicant then was liable for
the sum of \$47.43 as payment in full of applicant's liability
death of the insured insured and delivered the check to applicant in
policy, and in addition thereto alleged that applicant did a new
destination concerned the ordinary allegations of such insurance
ena Gill, the certificate being for the sum of \$1,000.00. The
also issued by the applicant corporation to the deceased insured of
Court of Knox County, Tennessee, as a testamentary beneficiary.

Issue was joined and a trial was had before a jury in December, 1928, and the jury found the issues in favor of the plaintiff and assessed the damages at \$1000.00. The case was brought to this court for review, and it was reversed and remanded to the trial court. At the February term of the Circuit Court of Knox County a trial was had and the jury rendered a verdict in favor of the plaintiff in the sum of \$1,000.00. The case is again brought to this court by appellant for review.

The appellee to make out her case in chief, offered the certificate of insurance and that date of death of the insured. It was then stipulated by the parties that the testimony previously given by Mrs. Wornock, Secretary of the local lodge, that the appellant issued and delivered its check to appellee for the death of the insured for the amount of the assessments that had been paid by the deceased to the lodge, amounting to \$347.45, and that the appellee had returned the check to appellant. The original draft was admitted in evidence. The appellee then rested her case.

The appellees offered evidence to sustain their claim that the insured had committed suicide. Their evidence tended to show that the wife of decedent had left home, and on returning to the house could not open the door; that she called some of the neighbors and they broke into the house and found the insured lying in bed, dead. He was dressed in his night clothes lying in the bed with his head turned away from the window. There was a strong smell of gas in the room, the windows were down, and they discovered the gas jet was turned on, but at the time the people entered the room there was no gas coming out of the jet. The meter that controlled the flow of gas into the jet was what is commonly called a "quarter-meter," and the gas had become exhausted from the meter. The witnesses described in detail the position they found the deceased in the room at the time he was discovered. The defendant also put in evidence

relative to the physical condition of the deceased prior to his death; that he suffered from severe headaches, etc.

The appellee in rebuttal introduced testimony of some of the neighbors that had seen the deceased during the day and evening before he was found dead; they testified that he had, so far as they could see, been perfectly normal and that he had brought home some ice cream in his automobile and during the evening he had been seen reading the paper and smoking his pipe. Some of the neighbors testified that the deceased had planned to go fishing with his neighbors on the day that he was found in his bed; ~~that~~ this fishing trip had been planned on the day before, and that the deceased had made necessary preparations to go on this fishing trip. Other details of what the deceased had done on the day before and ~~what~~ he had planned to do the day of his death were detailed by other witnesses.

The appellant earnestly insists that this judgment should be reversed for the reason that the verdict is contrary to the preponderance of the evidence. After a careful examination of the records in this case, we cannot say that the verdict is manifestly against the weight of the evidence. This is the second time that the case has been before us and each time the jury has found in favor of the appellee. The evidence was substantially the same in both trials. The jury and the trial Judge were in much better position than a court of review to pass on the credibility of the witnesses, and the manner in which they gave their testimony, and this court would not be justified in setting aside this verdict on the ground that it is manifestly against the weight of the evidence.

The appellant complained of the fourth instruction given on behalf of the appellee by the trial judge. In the case of the American Home Circle vs. Schneider 134 Ill. App. 604, in passing upon practically the same instruction the Appellate Court of the 3rd District say: "The appellee's 4th instruction was properly given. It in effect told the jury that the "burden of proof was upon the appellant to show that the insured came to his death by

his own hands, and that in the absence of proof of the cause of death, natural or accidental causes would be presumed." This instruction stated a correct proposition of law and was properly given. Knight Templars Indemnity Co. vs. Crayton, 209 Ill. 550. This identical instruction was given in the former trial and while it is not especially commented upon in the former opinion, it was thought at that time to be a correct statement of the law, and this court is now of the opinion that this instruction properly stated the law and the court did not err in reading it to the jury.

We find no reversible error in this case and the judgment of the Circuit Court of Knox County is hereby affirmed.

the own hands, and that in the absence of proof to the contrary
State, natural or essential causes could be presumed. This
Instruction stated a correct application of the law and was properly
given. Briefly stated, the law is, that if a person is injured
this identical instruction was given in the former trial and while
it is not especially commented upon in the former opinion, it is
thought as best time to be a correct statement of the law, and that
court is now of the opinion that this instruction properly stated
the law and the court did not err in reading it to the jury.
We find no reversible error in this case and the judgment
of the circuit court is hereby affirmed.

STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in
and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the_____

of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this_____day of
_____in the year of our Lord one thousand
nine hundred and twenty-_____

Clerk of the Appellate Court

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the second day of February, in
the year of our Lord one thousand nine hundred and thirty-two,
within and for the Second District of the State of Illinois:
Present--The Hon. THOMAS M. JETT, Presiding Justice.

Hon. FRED G. WOLFE, Justice.

Hon. JAMES S. BALDWIN, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff. /

265 I.A. 615³

BE IT REMEMBERED, that afterwards, to-wit: On

FEB 24 1932 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

October Term, A. D. 1931

Citizens State Bank of
Prophetstown, Illinois,
Appellant,

vs.

Appeal from the Circuit Court
of Henry County.

First National Bank of
Erie, Illinois, First
National Bank of Geneseo,
Illinois, and Fred B. Swanson,
Sheriff of Henry County,
Illinois,

Appellees.

WOLFE, J:

The appellant, Citizens State Bank of Prophetstown, Illinois, filed its bill in the Circuit Court of Henry County, asking for a temporary injunction to restrain the Sheriff, et al, of the county, from selling certain corn which they allege belonged to the complainant. The bill alleges that the complainant had a chattel mortgage on the property of Perry W. Kempster, who was the owner in fee simple of certain described real estate and that said real estate had been leased to tenants who were in possession of the same; that the said tenants were to pay to Perry W. Kempster one-half of all the corn raised upon said premises as rent for the same, said corn to be delivered in the crib after the same had been gathered. The bill further alleges that the said Perry W. Kempster mortgaged his interest in said corn to the complainant.

The bill further alleges that the First National Bank of Geneseo, Illinois, secured a judgment by confession against the said Kempster and delivered an execution to the Sheriff of Henry County and the Sheriff attempted to make a levy upon the corn, both in the field and that which was picked on the land in question. The bill further avers that the First National Bank of Erie, Illinois, pro-

IN THE
COURT OF THE DISTRICT OF COLUMBIA
IN AND FOR THE DISTRICT OF COLUMBIA

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in that the same is not the case for the other two.

10. The following are the names of the persons who have been appointed to the various committees of the Board of Directors:

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and that for the purpose of the investigation, the following information was obtained:

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cured a judgment against Kempster and had an execution issued on the same and attempted to levy on the same corn. These executions were delivered to the Sheriff for execution on the 30th day of October, A.D. 1930.

The bill further alleges that the corn in question was not divided, nor the share of Perry W. Kempster set-off to him until the 9th day of February, 1931, and that on the 10th day of February, A.D. 1931, the appellants seized the corn upon the described premises which was the property of said Kempster.

The bill avers that the said Kempster did not have legal title to said corn at the time he executed said chattel mortgage; therefore, in a court of law the chattel mortgage did not operate to convey to the appellants a lien upon the same, and that said Perry W. Kempster could not legally mortgage his interest in said corn until said corn was divided and his share set-off to him; but, that in equity while such mortgage itself did not pass the title to such property it created in the mortgagee, the appellants, an equitable interest, which said interest was prior to any interest of any judgment creditor, and that the mortgage, though inoperative as a conveyance, was operative as an executory agreement, and in equity the said mortgage transfers the beneficial interest of said Perry W. Kempster to the appellants.

The bill further avers that when the Sheriff attempted to make the levy upon the corn on the 8th day of November, the said Perry W. Kempster did not have title or possession of the corn, and therefore, the attempt to levy was void and of no legal effect in that the defendants have not caused or attempted to make any further levy upon the corn since the same has been divided; but the said defendants claim to have a right of possession of said corn and threaten to sell and dispose of the same and the appellant fears and believes that the said defendants will carry out their

threats into execution unless restrained by an injunction of the court. The bill further avers that on the 13th day of February, A.D. 1931, the complainants sold the said corn at a chattel mortgage sale, and at said sale the complainants bid in said corn and the said corn did not bring sufficient money to pay the said balance due upon the notes secured by the chattel mortgage.

The bill prays for an injunction restraining the defendants from interfering with the right of possession of the complainants corn stating that they know of no adequate remedy at law to protect their rights, and if the injunction is not issued to restrain the defendants from interfering with the possession of the complainant's corn, they will suffer irreparable injury, etc.

After the original bill was filed a supplemental bill was filed on March 14th, 1931, setting up the fact that the Sheriff had seized said corn in such executions and was advertising the same for sale on March 16th, 1931; that notice of such sale had just come to the complainant's knowledge and they asked for a temporary injunction against the defendants to restrain them from enforcing their claim of lien against the corn.

A temporary injunction was issued and on motion of the defendant to dissolve the same being filed, the court set the same for hearing and dissolved the injunction for the reason that there was no equity in the bill. On motion of the defendants the court heard the evidence and assessed the defendant's damages at \$200.00 for the wrongful suing out of the writ of injunction.

The case comes to this court on bill for review of the findings of the court. The only thing before this court to decide is this, namely, "Is the bill sufficient to sustain a cause of action; or did the complainants have an adequate remedy at law?" From an examination of this bill it shows that the complainants had possession of this corn under the chattel mortgage, advertised the same for sale and bid in the corn themselves, and any right that they had under their chattel mortgage was merged in the sale

the case comes to this court on bill for review of the
findings of the jury. The only issue before this court is decide
is this, namely, "is the bill willfully and maliciously
returned; or did the defendants have an honest belief in
its truth?"

There is an examination of this bill to show that the defendants
had a bona fide belief in its truth at the time it was returned.
The same has been said in the past, and it is not necessary
to repeat it here. The only issue before this court is decide
is this, namely, "is the bill willfully and maliciously
returned; or did the defendants have an honest belief in
its truth?"

There is an examination of this bill to show that the defendants
had a bona fide belief in its truth at the time it was returned.
The same has been said in the past, and it is not necessary
to repeat it here. The only issue before this court is decide
is this, namely, "is the bill willfully and maliciously
returned; or did the defendants have an honest belief in
its truth?"

of the property. If their chattel mortgage was a superior lien to the judgment creditor's lien, their title would be good as against the judgment creditors. This bill asks a court of equity to decide a purely legal question, viz: Was the title of the complainants to the corn superior to that of the judgment creditors? This a court of equity will not do unless there is some other interest that a court of law cannot properly adjudicate. (Mansfield vs. Mansfield, 203 Ill. 92) Struber vs. Belsey 79 Ill. 307).

In the case of Hansen vs. Ralston, 168 Ill. App. 163, this court through Justice Dibell says: "Aurelia J. Hansen could not maintain a bill in equity to enjoin the sale of her personal property if her personal property was levied upon under an execution against another and not against herself. She had at least three remedies at law. She could have a trial of the right of property under the statute; she could replevy the property from the Sheriff; she could let the sale go on and sue the Sheriff in trespass." We are of the opinion that this language is very applicable to the case at bar and that the complainant had a complete and adequate remedy at law to protect all of its rights as set forth in their bill of complaint. The judgment of the Circuit Court of Henry County is hereby affirmed.

Judgment affirmed.

STATE OF ILLINOIS,

SECOND DISTRICT

}
ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in
and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the_____

of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this_____day of
_____in the year of our Lord one thousand
nine hundred and twenty-_____

Clerk of the Appellate Court

477
AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the second day of February, in the year of our Lord one thousand nine hundred and thirty-two, within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.

Hon. FRED G. WOLFE, Justice.

Hon. JAMES S. BALDWIN, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

265 I.A. 615⁴

BE IT REMEMBERED, that afterwards, to-wit: On

FEB 24 1932 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

October Term, A. D. 1931.

Ella Coy,
Appellee,

vs.

Appeal from Circuit Court
of Peoria County.

Frances E. Cutright,
Appellant.

And Harry Baur.

WOLFE, J:

Ella Coy, the appellee, brought suit in the Circuit Court of Peoria County against Frances E. Cutright and Harry Baur for injuries she had sustained by being struck by the automobile of appellant Frances E. Cutright, which car was being driven by Harry Baur. The declaration filed consists of five counts. The first count charges that the appellant, Frances E. Cutright was the owner of the automobile in question; that Harry Baur, who does not join in the appeal to this court, was her chauffeur; and while so employed was guilty of negligence; that he ran into the appellee while she was crossing a certain street in the City of Peoria with the result that appellee suffered a serious and permanent injury. The second count charges that the defendant, Frances Cutright, through her agent, was driving said car at an unreasonable and dangerous rate of speed. The third count charges the defendants with failure to give any warning of his approach. The fifth count charges appellant with general negligence. None of the counts charge wanton or wilful conduct in the operation of the automobile.

The appellant filed the general issue and a special plea setting up the fact that Baur, at the time of the collision was not the agent of appellant, nor acting for her, and was not

IN THE
COURT OF THE DISTRICT OF COLUMBIA
JANUARY 11, 1911

Between Mary, A. L. 1911.

Ella Cox, Appellee,

vs.

Frances E. Outright, Appellant,
and Harry Burr.

WITNESSES:

Ella Cox, the appellee, being first in the witness

stand of Peoria County against Frances E. Outright and Harry

Burr for injuries she had sustained by being struck by the auto-

mobile of appellant Frances E. Outright, which car was being

driven by Harry Burr. The declaration filed consists of five

counts. The first count charges that the appellant, Frances

E. Outright was the owner of the automobile in question; that

Harry Burr, who does not join in the appeal to this court, was

her chauffeur; and while so employed was guilty of negligence;

that he ran into the appellee while she was crossing a certain

street in the City of Peoria with the result that the appellee

sustained a serious and permanent injury. The second count

charges that the defendant, Frances Outright, through her agent,

was driving said car at an unreasonable and dangerous rate of

speed. The third count charges the defendant with failure to

give any warning of his approach. The fifth count charges

appellant with general negligence. Some of the counts charge

wanton or willful conduct in the operation of the automobile.

The appellant filed two general issues and a special

plea setting up the fact that Burr, at the time of the collision

was not the agent of appellant, nor acting for her, and was not

then and there engaged nor in the pursuit of appellant's business. Issue was joined on these pleas. At the March term of Court, 1931, trial was had before a jury, which resulted in a verdict in favor of the appellee in the sum of \$12,000.00.

At the close of the plaintiff's evidence and at the close of all the evidence, the appellant asked for a directed verdict which was in the usual and proper form. Motions for a directed verdict were overruled and judgment rendered against both defendants for the sum of \$12,000.00. From which judgment, a joint and several appeal was prayed. The appellant, Frances E. Cutright, brings her separate appeal to this court.

It appears from the evidence that Frances E. Cutright owned an automobile and Harry Baur was her regular chauffeur. On the day of the accident, he took Mrs. Cutright to church. He left her there and was to return in about an hour to get her and take her home. During the interval that the appellant Frances Cutright was at church, Baur had no duties to perform for the appellant Cutright. The appellant was in the church about an hour. During this time, Baur took a friend of his out riding in the car to see the City. It was at this time he collided with the appellee. At the time of the collision, Baur was driving along McClure Street at the speed approximated by the various witnesses, varying from 25 to 35 miles per hour. The appellee had been riding in a bus on the same street. The bus stopped and appellee alighted and walked along the curb/a short distance, and then went into the street. She claims she looked east and saw nothing coming, and then looked west and saw a car approaching which she ~~estimated~~ estimated to be three or four hundred feet away. She continued to walk across the street and when she had arrived about the middle of the street, she and the car of the appellee, which she says she had seen approaching, collided. She testified that the front bumper of the car hit her, but other witnesses claim that she was struck by

the front fender. It appears from the evidence that as she was struck by the car, she was whirled around three or four times and fell into the street. The car went on, but was stopped within a distance of from 40 to 50 feet. The manner of her falling would seem to indicate that she was hit by the side of the car instead of by the bumper. As a result of this collision, the appellee's arm was broken, and she was taken to the hospital and received treatment for the injury. When the local doctor thought that the arm should be placed in a cast, the appellee went to Chicago and she was there subjected to some sort of treatment in a hospital, which included the breaking the bone of her arm. The doctor claimed this was for the purpose of making a better union. She later returned to Peoria and was placed under a doctor's care who treated her for some time. The skillfulness of the doctor's treatment at Peoria is not question^d, but the record is silent as to the reliability and the necessity of the treatment that was administered at Chicago. At the time of the trial, the evidence showed that she still suffered some pain; that two of the fingers of her right hand were somewhat numb; and that she did not have the use of her right arm as freely as before the accident. She is now employed in a restaurant, but the record is silent as to what wages she now receives, or has received at any former time.

The day of the accident was a bright, sunny day. There were no vehicles or obstructions on the street which interfered with the vision of the appellee, or defendant Baur. Each was in full view of the other. As above stated, appellee says she saw the car as it was approaching her, at least for a distance of 300-feet. Baur says that he did not see the appellee until his car was within a few feet of her. The testimony shows that as the appellee was crossing the street, she was walking quite fast, and at the time of the collision, or at about that time, she was looking in the direction that she was walking. Baur testified that at the time of the accident, he was on his way home for the purpose

the front fender. It appeared from the evidence that he was struck by the car, and was thrown some 25 feet into the air, and fell into the street. The car went on, and was stopped within a distance of 100 to 150 feet. The driver of the falling wheel was to indicate that he was hit by the side of the car instead of by the bumper. As a result of this collision, the passenger arm was broken, and she was taken to the hospital and received treatment for the injury. When the local doctor attending the case should be placed in a case, the accident was at Chicago and she was there subjected to some sort of treatment in a hospital, which included the breaking in bone of her arm. The doctor claimed this was for the purpose of setting a better position. She later returned to Peoria and was placed under a doctor's care and treated her for some time. The skillfulness of the doctor's treatment at Peoria is not questioned, but the record is silent as to the reliability and the necessity of the treatment that was administered at Chicago. At the time of the trial, the evidence showed that she still suffered some pain; that two of the fingers of her right hand were somewhat numb; and that she did not have the use of her right arm as freely as before the accident. She is now employed in a restaurant, but the record is silent as to what wages she now receives, or has received at any former time. The day of the accident was a Friday, May 15, 1920. There were no vehicles or obstructions on the street where the accident took place, or in the vicinity, or in the street where the accident took place. This view of the street, as above stated, was taken from the car as it was approaching her, and was for a distance of 300 feet. She says that she did not see the accident until she was within a few feet of her. The accident took place at the intersection of the street and the street, and the accident was caused by the car, and at the time of the collision, she was about 100 feet from the car, and was looking in the direction that she was walking. She testified that at the time of the accident, she was on his way home for the purpose

of leaving his guest with whom he was riding, before he was going to the church to get his employer, Mrs. Cutright. The evidence shows that the street on which he was driving, led past his own home, and if he continued on, he would be on his way to the church where his employer was attending services.

The appellant raises the point that the court erred in refusing to direct a verdict for the appellant, for there is no evidence that the automobile was negligently operated at the time of the accident; also, that there is no evidence that Baur was an agent or servant of the appellant when the appellee was injured; that there is no evidence that the appellee was in the exercise of due care at the time of the collision.

Whether the automobile of the appellant was negligently operated at the time of the accident, or whether the appellee was in the exercise of due care and caution for her own safety at that time, are usually and ordinarily questions for the jury to decide, and owing to other questions involved in this suit, we do not express an opinion as to the weight of the evidence, or whether negligence had been proved against the appellant or whether the appellee was guilty of any negligence that contributed to her own injuries.

It is earnestly insisted by the appellant that the evidence shows that Baur, at the time of the accident was not the agent of appellant Cutright, and therefore, she could not be held liable for the negligent act of Baur. The declaration charges that at the time of the accident, Baur was the agent and acting for appellant. To this declaration, a special plea was filed by the appellant denying that Baur was at the time of accident, acting as her agent or servant, or in any way engaged in the pursuit of her business. This plea made that question an issue of fact, and placed the burden on the appellee of proving affirmatively by a greater weight of the evidence that relation

of leaving his room with whom he was riding, before he was going to the church to get his engine, Mr. Wright. The evidence shows that the street on which he was riding, had been his own home, and it is contended that he would be on his way to the place where his employer was attending business.

The appellant raises the point that the engine was in operation to direct a verdict for the appellant, for there is no evidence that the automobile was negligently operated at the time of the accident; also, that there is no evidence that there was an agent or servant of the appellant when the accident was injured; that there is no evidence that the appellee was in the exercise of due care at the time of the collision.

Whether the auto of the appellee was negligently operated at the time of the accident, or whether the appellee was in the exercise of due care and caution for his own safety at that time, are usually and ordinarily questions for the jury to decide, and owing to other questions involved in this case, we do not express an opinion as to the weight of the evidence, or whether the negligence had been proved against the appellant or whether the appellee was guilty of any negligence that contributed to her own injuries.

It is earnestly insisted by the appellant that the evidence shows that now, at the time of the accident was not the agent or appellant Wright, and therefore, she could not be held liable for the negligent act of him. The defendant charges that at the time of the accident, she was the agent and acting for appellant. In this declaration, a general plea was filed by the appellee denying that there was at the time of accident, acting as her agent or servant, or in any way connected in the pursuit of her business. This plea made that question an issue of fact, and placed the burden on the appellee of proving affirmatively by a preponderance of the evidence that relation

of master and servant did exist, at the time of the accident as alleged in the declaration. The appellee offered no evidence that proved or tended to prove the existence of such relation at the time of the accident.

Appellee contends that she established an agency, and once established, the presumption arises that the agency continues, and cites *Kvale vs. Morton Salt Co.*, 329 Ill., 445 as sustaining their contention. While this case supports the appellee in their contention, the facts in that case are not similar to this case, and we think the law as there cited, is not applicable. The defendant Baur testified, and we find no evidence contradictory in this regard, that at the time of the accident, he was not doing anything in behalf of his employer, but was using her car solely for his own pleasure. In the case of *Lohr vs. Barkmann Cartage Co.*, 335 Ill. 335, our Supreme Court in discussing this matter, use this language: "While it is admitted by plaintiff in error that Schwinnen on that day was its agent and the presumption exists that the agency having been established continues, such presumption is not evidence. Presumptions are never indulged where established facts exist. They supply the place of facts. When evidence is produced which is contrary to the presumption, the presumption vanishes entirely. Whether Schwinnen was in plaintiff in error's employ at the time of the accident, depends upon the facts surrounding that occurrence."

One of the latest expressions of our Supreme Court relative to the owner of an automobile being responsible for the ~~is~~ acts of his driver is found in the case of *White vs. Seitz*, 342 Ill. 266, in which they say: "The owner of an automobile who merely permits another to use it for his own purpose is not liable for the negligence of the person so using it; that the owner of an automobile is not liable for the injury occasioned by the negligent use of the machine by its servant;

of water and a want did arise, at the time of the accident
as alleged in the declaration. The evidence offered in evidence
that proved or tended to prove the existence of such relation at
the time of the accident.

Appellee contends that she established an agency, and
once established, the presumption arises that the agent conducted
and after *Wells vs. Boston Salt Co.*, 235 Ill., 414, we sustained
their contention. While this case supports the position in their
contention, the reason in that case and not at all in this case,

and we think the law as there cited, is not applicable. The
defendant here testified, and we find no evidence contradictory
in this regard, that at the time of the accident, he was not do-
ing anything in behalf of his employer, but was using his car
solely for his own pleasure. In the case of *John vs. Hermann*
Garage Co., 235 Ill. 335, our Supreme Court in discussing this
matter, use this language: "While it is admitted by plaintiff
in error that Schinner on that day was its agent and the pre-
sumption exists that the agency having been established continues,
such presumption is not evidence. Presumptions are never indulged
where established facts exist. They supply the place of facts.
When evidence is produced which is contrary to the presumption,
the presumption vanishes entirely. Whether Schinner was in
plaintiff in error's employ at the time of the accident, depends
upon the facts surrounding that occurrence."

One of the latest expressions of our Supreme Court
relative to the owner of an automobile being responsible for
the acts of his driver is found in the case of *State vs.*
Wells, 235 Ill. 335, in which they say: "The owner of an auto-
mobile who merely permits another to use it for his own purpose
is not liable for the negligence of the former so long as
that the owner of an automobile is not liable for the injury
occasioned by the negligent use of the machine by its operator;

if the servant was at the time at liberty from the service of his master and not engaged in doing his master's business, but was pursuing his own interests exclusively." -- See also Metz vs. Yellow Cab Company, 248 Ill. App. 609."

The appellee has not proven that at the time of the accident Baur was the agent, or acting for the appellant, and the court erred in overruling the appellant's motion for a directed verdict as to Frances E. Cutright at the close of all the evidence.

Another assignment of error of the appellant is that the verdict and judgment are grossly excessive, and for that reason it shows that the jury was governed by passion or prejudice in arriving at their verdict. The evidence shows that at the time of the accident, the appellee was attending a business school and preparing herself to become a stenographer and bookkeeper; that her hand is now in such a condition it is doubtful whether she could be successful in that undertaking. Since her injury, she has had several positions, one as an 'ad' writer for the Peoria Star for four months, in which she used her pencil in her injured hand. Later, she worked at a grocery store for about three weeks. She worked at several other places, and at the time of the trial was employed as a waitress at a cafeteria. The record is silent as to the wages that she has received at any of her employments, or whether the wage as a waitress at the cafeteria is more or less than she would have received had she finished her business course and fitted herself for a stenographer or bookkeeper. The only evidence upon which the jury could base their verdict of damages, would be the doctor's bills, hospital bill and nurse hire, pain and suffering. It seems to us according to this evidence that the verdict of \$12,000.00, is grossly excessive for the injuries which the appellee has sustained, and that the jury, in arriving at their verdict were actuated by passion and prejudice. For the reasons above stated,

in the event was at the time of the accident, and it is not possible to say whether the accident was caused by the driver or by the passenger.

The accident was caused by the driver, and the passenger was not responsible for the accident.

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The accident was caused by the driver, and the passenger was not responsible for the accident.

The accident was caused by the driver, and the passenger was not responsible for the accident.

the judgment of the Circuit Court of Peoria County is hereby reversed and the case remanded.

Reversed and remanded.

the object of the present Bill of Law is to reverse the
reversed and the case reversed.

Reversed and remanded.

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I, JUSTUS I. JOHNSON, Clerk of the Appellate Court, in
and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the_____

of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this_____day of
_____in the year of our Lord one thousand
nine hundred and twenty-_____

Clerk of the Appellate Court

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the second day of February, in the year of our Lord one thousand nine hundred and thirty-two, within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.

Hon. FRED G. WOLFE, Justice.

Hon. JAMES S. BALDWIN, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

265 I.A. 615⁵

BE IT REMEMBERED, that afterwards, to-wit: On

MAR 15 1932

the opinion of the Court was filed in the

Clerk's office of said Court, in the words and figures

following, to-wit:

Collette Radlebeck, by Joseph
Radlebeck, her next friend,
Defendant in error,

vs.

Error to the Circuit Court of
Peoria County.

Edith Bourg and Jeanette Zara,
Jeanette Zara,
Plaintiff in error.

JETT, P.J:

This suit was brought in the Circuit Court of Peoria County by Collette Radlebeck through her next friend, Joseph Radlebeck, to recover damages for a burn sustained by her in a Five Dollar Permanent Wave Shop, a beauty parlor in the City of Peoria, operated by Edith Bourg and Jeanette Zara.

A jury trial was had resulting in a finding in favor of the defendant in error in the sum of \$5250.00 upon which judgment was rendered and Jeanette Zara only prosecutes this writ of error.

For convenience, defendant in error will be hereinafter referred to as plaintiff, and plaintiff in error as defendant.

A declaration consisting of three counts was filed. The first count avers that the machine and appliances used in water waving were in the sole and exclusive control of the defendant; that the plaintiff exercised due care and caution in her own behalf; that negligence on the part of the defendant cause the plaintiff to be burned, etc. The second avers exclusive control of the machine by the defendant; due care and caution on the part of the plaintiff and lack of repair and a defective condition of the machine and appliances and over-heating thereof; negligence of the defendant in permitting a defective condition and over-heating of the machine. In the third count it is averred that the defendant was in exclusive control of the machine; due care and caution of plaintiff; and that the defendant negligently used a celluloid comb or combs in the water waving which ignited and caused the burn.

Collette Raddebeck, by herself,
Raddebeck, her next friend,
Defendant in error,

vs.
James W. Raddebeck,
Plaintiff in error.

With Henry and Jeannette Sars,
Jeannette Sars,
Plaintiff in error.

JURY, P. 1.

This suit was brought in the Circuit Court of Peoria County
by Collette Raddebeck through her next friend, Joseph Raddebeck,
to recover damages for a burn sustained by her in a five dollar
Permanent Wave Shop, a beauty parlor in the City of Peoria, owned
by Edith Bork and Jeannette Sars.

A jury trial was had resulting in a finding in favor of the
defendant in error in the sum of \$200.00 upon which judgment was
rendered and Jeannette Sars only prosecutes this writ of error.

For convenience, defendant in error will be hereinafter referred
to as plaintiff, and plaintiff in error as defendant.

A declaration consisting of three counts was filed. The first
count avers that the machine and appliances used in said shop
were in the safe and exclusive control of the defendant; that the
plaintiff exercised due care and caution in her own behalf; that
negligence on the part of the defendant caused the plaintiff to be
burned, etc. The second avers exclusive control of the machine by
the defendant; due care and caution on the part of the plaintiff
and lack of repair and a defective condition of the machine and
appliances and over-heating thereof; negligence of the defendant
in permitting a defective condition and over-heating of the machine.
In the third count it is averred that the defendant was in exclusive
control of the machine; due care and caution of plaintiff; and that
the defendant negligently used a celluloid comb or comb in the
water waving process which caused the burn.

To the declaration the general issue was pleaded.'

It appears that on May 19th, 1928, Collette Radlebeck went to the Five Dollar Permanent Wave Shop pursuant to an appointment previously made for a water wave; that a water wave is given by wetting the hair, placing combs in the position desired for the waves and a lamp consisting of a bulb under a metal shade on an adjustable standard is then placed over the head and the wave is set by the drying of the hair from the heat emanating from the lamp.'

The record discloses that the plaintiff at the time she received the injury of which she complains was 17 years of age; that she knew Edith Bourg and Jeanette Zara; that at the time she went to the shop to obtain the water wave Jeanette Zara wet her hair and Edith Bourg put combs in her hair and placed her under the lamp; that Jeanette Zara came over and felt her hair to see if it was getting dry; that the combs exploded and burned her; that she put up her hands to put out the fire and that she fainted.' A doctor was called.'

The doctor testified that he knew Collette Radlebeck and had treated her professionally on May 19th, 1928; that he found she had received a burn on her head and that an area of over four or five inches was charred; head burned down to skull; that he gave her treatment, took her home and treated her from May 19th to August 17th, 1928; that her head was not yet healed in August; that treatments were continued at her home; that skin had been grafted on June, 1928, by Dr. Hanna at Proctor Hospital where plaintiff was confined for that purpose for about ten days or two weeks; that the head of the plaintiff where the burn occurred is permanently bald and may break out and become sore; that she had pain and fever during this period and suffered from nervous shock; that his bill was \$222.00, which is the customary charge.' Dr. Hanna's bill was \$150.00, the usual charge for such surgical work.'

Catherine Radlebeck testified that she was the mother of the plaintiff; that she first learned of the accident at eight o'clock when she came home and found Collette in bed; that she took care of

To the defendant the general issue was pleaded.

It appears that on May 19th, 1930, Collette had been

to the shop to have her hair cut and styled. She was given by
gradually made for a better style; that a water was given by
washing the hair, which was in the position desired for the
waves and a large quantity of a hair cream was applied to the
adjustable strands in the hair placed over the head and the wave is
set by the drying of the hair from the heat emanating from the
lamp.

The record discloses that the plaintiff at the time she re-
ceived the injury of which she complains was 17 years of age; that
she knew Edith Bourne and Jeanette Bane; that at the time she went
to the shop to obtain the water wave Jeanette Bane was present;
and Edith Bourne put soap in her hair and placed her under the
lamp; that Jeanette Bane came over and felt her hair to see if
it was getting dry; that she combed Jeanette's and combed her; that
she put up her hands to put out the fire and that she fainted.
A doctor was called.

The doctor testified that he knew Collette Radlebeck and that
he treated her professionally on May 19th, 1930; that he found she had
received a burn on her head and that an area of over four or five
inches was charred; head turned down to avoid; that he gave her
treatment, took her home and treated her from May 19th to August
15th, 1930; that her head was not yet healed in August; that treat-
ments were continued at that time; that skin had been washed in
June, 1930, by Dr. Wynn at Wynn's Hospital where plaintiff was
confined for that purpose for about two days or two weeks; that
the head of the plaintiff where the burn occurred is permanently
red and may break out and become sore; that the hair will not grow
during this period and suffered from nervous shock; that it will
cost \$20.00, which is the customary charge. Dr. Wynn's bill was
\$150.00, the usual charge for such surgical work.

Other testimony was given that she was the mother of the
plaintiff; that she first learned of the accident at plaintiff's home.

Collette herself, put oil on her head, washed the pus off, dressed her head every hour and continued treatment until August; that she kept her on a diet, fed her while Collette's hands were tied up; that her eyes were blood-shot and her neck swollen; that the plaintiff was taken to the hospital for the grafting operation; that she remained there ten days; could not walk for possibly two weeks. The night of the accident Celia Zara and another lady came to Radlebeck's home. After that Mrs. Bourg and Celia called several times. Once Jeanette Zara and Celia called. Mrs. Bourg and Celia said that they were sorry that the combs were celluloid; that they wanted to do the right thing, etc.'

Defendant to sustain her contention denies that the combs used were celluloid; that the plaintiff used due care and caution in her own behalf; and that the machine was in exclusive control of the defendant.'

A number of reasons are assigned for a reversal of the judgment. It is the contention of the defendant that the court erred in refusing to direct a verdict at the close of the testimony offered by the plaintiff and likewise in refusing to direct a verdict for the defendant at the close of all of the evidence on the ground that the plaintiff was guilty of contributory negligence. It is also urged by the defendant for a reversal of the judgment that the cause was tried on the part of the plaintiff on the theory that the doctrine of *res ipsa loquitur* applied and that it was error to try the case upon such theory.' It was a question of fact for the jury to pass upon whether or not the plaintiff was in the exercise of due care and caution at the time of the receiving of the burn of which she complains.' On this question the jury heard all of the evidence and was fully instructed as to the law bearing thereon.' Since it was a question of fact whether or not the plaintiff was in the exercise of due care and caution, we can see no reason for a reversal of the judgment upon that ground.'

Collette herself, put oil on her head, washed the top of her head over and over, and continued treatment until about 10:30. She kept her on a diet, but her white Collette's hands were tied up; that her eyes were blood-shot and her neck swollen; that the plaintiff was taken to the hospital for the plaintiff's treatment; that she remained there ten days; could not walk for nearly two weeks. The right of the accident Collette had and another lady came to Kahlbeck's home. After that Mrs. Kahlbeck and Collette called several times. Once Janette Kahlbeck and Collette called. Mrs. Kahlbeck and Collette said that they were sorry that the case was settled; that they wanted to do the right thing, etc.

Defendant to sustain her contention desires that the same used were admitted; that the plaintiff used the same and content in her own behalf; and that the machine was in exclusive control of the defendant.

A number of reasons are assigned for a reversal of the judgment. It is the contention of the defendant that the court erred in refusing to direct a verdict at the close of the testimony offered by the plaintiff and likewise in refusing to direct a verdict for the defendant at the close of all of the evidence on the ground that the plaintiff was guilty of contributory negligence. It is also urged by the defendant for a reversal of the judgment that the case was tried on the part of the plaintiff on the theory that the doctrine of res ipsa loquitur applied and that it was error to try the case upon such theory. It was a question of fact for the jury to pass upon whether or not the plaintiff was in the exercise of due care and caution at the time of the receipt of the burn of which she complains. On this question the jury heard all of the evidence and was fully instructed as to the law bearing thereon. Since it was a question of fact whether or not the plaintiff was in the exercise of due care and caution, we can see no reason for a reversal of the judgment upon that ground.

It appears that the question principally relied upon for a reversal of the judgment is that the doctrine of *res ipsa loquitur* cannot be invoked. We have examined the evidence with this point in view and we have reached the opinion that from the facts as disclosed by the record the doctrine of *res ipsa loquitur* can be properly invoked in this case. The evidence shows that the instrument and implements used in giving the water wave were within and under the control of the parties operating the beauty parlor.

As was stated in the *Chicago City Railway Company vs. Charles Barker*, Admr., 209 Ill. 321-326, the meaning of the maxim *res ipsa loquitur* is that while negligence is not, as a general rule, to be presumed, yet the injury itself may afford sufficient *prima facie* evidence of negligence, and the presumption of negligence may be created by the circumstances under which the injury occurred. In said above entitled cause at said page 326, quoting from a former decision it was said: "Where negligence is thus presumed from the occurrence of the injury, defendant is called upon to rebut the *prima facie* case by showing that he took reasonable care to prevent the happening of such injury." *Hart vs. Washington Park Club*, 157 Ill. 9. In *Hart vs. Washington Park Club*, *supra*, quoting from *Scott vs. Docks, Co.* 3 Hurl & C. 596, it was said: "There must be reasonable evidence of negligence. But when the thing is shown to be under the management of the defendant or his servants and the accident is such, as in the ordinary course of things does not happen if those, who have the management, use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of care."

In Addison on Torts, Vol. 1, Section 33, the rule was thus stated: "Where the accident is one which would not, in all probability happen if the person causing it was using due care, and the actual machine, causing the accident, is solely under the

It appears that the question originally relied upon for a reversal of the judgment is that the doctrine of res ipsa loquitor cannot be invoked. We have examined the evidence with this point in view and we have reached the opinion that first the facts as disclosed by the record are doctrine of res ipsa loquitor can be properly invoked in this case. The evidence shows that the instrument and implements used in giving the water were within and under the control of the parties operating the pebble parlor.

As was stated in the Chicago City Railway Company vs. Charles Barker, 200 Ill. 77-290, the meaning of the maxim res ipsa loquitor is that while negligence is not, as a general rule, to be presumed, yet the injury itself may afford sufficient evidence of negligence, and the presumption of negligence may be created by the circumstances under which the injury occurred. In said above entitled case at said page 328, quoting from a former decision it was said: "Here negligence is thus presumed from the occurrence of the injury, defendant is called upon to rebut the prima facie case by showing that he took reasonable care to prevent the happening of such injury." Hart vs. Washington Park Club, 127 Ill. 9. In Hart vs. Washington Park Club, supra, quoting from Scott vs. Bock, 101 Ill. 301 & 302, it was said: "There must be reasonable evidence of negligence. But when the thing is shown to be under the management of the defendant or his servants and the accident is such, as in the ordinary course of things does not happen to those who have the management, use and control, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of care."

In Addison on Torts, Vol. I, Section 23, the rule was thus stated: "Where the accident is one which would not, in all probability, happen if the person operating it was using due care, and the actual machine, causing the accident, is solely under the

management of the defendant **** the mere occurrence of the accident is sufficient prima facie proof of negligence to impose upon the defendant the onus of rebutting it."

We have examined the instructions of which complaint is made. It is very apparent from the instructions given that the defendant is not in a position to complain of the action of the court in instructing the jury.

We conclude, therefore, that the judgment of the Circuit Court of Peoria County should be affirmed, which is accordingly done.

Judgment affirmed.

management of the defendant *** the mere occurrence of the accident is sufficient prima facie proof of negligence to impose upon the defendant the burden of rebuttal.

We have examined the testimony of which complaint is made. It is very apparent from the testimony given that the defendant is not in a position to complete the action of the court in instructing the jury.

We conclude, therefore, that the judgment of the District Court of St. Louis County should be affirmed, which is respectfully

Recommended.

STATE OF ILLINOIS.

SECOND DISTRICT

} ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and

for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby
certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause.
of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said
Appellate Court, at Ottawa, this _____ day of
_____ in the year of our Lord one thousand nine
hundred and thirty-_____

Clerk of the Appellate Court

717
AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the second day of February, in the year of our Lord one thousand nine hundred and thirty-two, within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.

Hon. FRED G. WOLFE, Justice.

Hon. JAMES S. BALDWIN, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

265 I.A. 616¹

BE IT REMEMBERED, that afterwards, to-wit: On

MAR 15 1932

the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 8318

Agenda 1.

Edward G. Schottler,
et al,

Plaintiffs in error,

vs.

Error to the Circuit Court
of Lake County

M. G. Ferguson, et al,
Defendants in error,

JETT, P.J.

This is a writ of error prosecuted by Edward G. Schottler and the Calumet National Bank, trustee, plaintiffs in error, to reverse a decree of the Circuit Court of Lake County in a mechanics' lien proceeding, in favor of Oscar Sandstrom, M. G. Ferguson, doing business as M. G. Ferguson and Company, and Steve Rynskel and M. C. Rynskel, partners, defendants in error.

It appears that in the month of May, 1928, A. M. Malick, owner of the real estate involved in this cause, entered into a contract with the Liberty Supply and Lumber Company, a corporation, as contractor in which it undertook to erect on the premises in question a building designed for a gasoline service station and living quarters, gasoline pits, etc., for which Malick agreed to pay \$25,000; that after entering into the contract and before construction was started, Malick and his wife executed a trust deed on May 28th, 1928, conveying the premises to the Calumet National Bank as trustee to secure a note of even date executed by them for \$25,000. The trust deed and note were delivered to the Liberty Supply and Lumber Company to secure payment for the improvements to be thereafter erected, and the trust deed was recorded in the Recorder's office in Lake County on May 31st, 1928. On June 11th, 1928, the Liberty Supply and Lumber Company entered into a contract with Sandstrom to construct a cement foundation and floor for the proposed building for which it agreed to pay \$700. The

Edward G. Schottler,

et al,

Error to the Circuit Court

Plaintiffs in error,

of Lake County

vs.

W. O. Ferguson, et al,

Defendants in error,

JURY, P. J.

This is a writ of error prosecuted by Edward G. Schottler

and the Calumet National Bank, trustee, plaintiffs in error, to

reverse a decree of the Circuit Court of Lake County in a partition

lien proceeding, in favor of Oscar Sandstrom, W. O. Ferguson, do-

ing business as M. G. Ferguson and Company, and Steve Rynskei and

A. C. Rynskei, partners, defendants in error.

It appears that in the month of May, 1928, A. B. Mallik,

owner of the real estate involved in this case, entered into a

contract with the Liberty Supply and Lumber Company, a corporation,

as contractor in which it undertook to erect on the premises in

question a building designed for a gasoline service station and

living quarters, gasoline pits, etc., for which Mallik agreed to

pay \$25,000; that after entering into the contract and before con-

struction was started, Mallik and his wife executed a trust deed

on May 28th, 1928, conveying the premises to the Calumet National

Bank as trustee to secure a note of even date executed by him for

\$25,000. The trust deed and note were delivered to the liberty

Supply and Lumber Company to secure payment for the improvements

to be thereafter erected, and the trust deed was recorded in the

Recorder's office in Lake County on May 31st, 1928. On June 11th,

1928, the Liberty Supply and Lumber Company entered into a con-

tract with Sandstrom to construct a cement foundation and floor

for the proposed building for which it agreed to pay \$700. The

work was done by Sandstrom according to the terms of the contract.

It further appears that thereafter the Liberty Supply and Lumber Company applied to the Calumet Bond and Investment Company for a loan of \$16,000, agreeing to pledge the \$25,000 note and trust deed executed by Malick and his wife, as collateral security for the loan. The president of the bond company, before accepting the collateral examined the premises in question and found the building in the process of construction. The loan was accepted and the \$25,000 note and trust deed were pledged as collateral security for the loan and \$5,000 advanced to the Liberty Supply and Lumber Company. At the same time an agreement was made that the Liberty Supply and Lumber Company was to furnish the Calumet Bond and Investment Company with statements showing their liabilities to subcontractors on the job. No further money was paid to the Liberty Supply and Lumber Company on account of the \$16,000 loan so arranged because the statements showing the indebtedness to subcontractors were not furnished. The loan remained in this condition with the \$25,000 note and trust deed as collateral security therefor until September 12th, 1929.

The record further discloses that on July 14th, 1928, M. G. Ferguson, doing business as M. G. Ferguson and Company, proposed to the Liberty Supply and Lumber Company to dig on the Malick job, a six inch well using National Special water well galvanized pipe at \$3.75 per foot, such well to give a supply of twenty gallons a minute. In August 1928, Ferguson began drilling a well. He worked on it for about two months. Then he started a second hole around October 1st, 1928, putting it down ninety feet. A test pump was run for five weeks night and day but the water did not clear. In January 1929 the pipe was continued to one hundred and seventy-seven feet when it was temporarily connected to the building which was then nearing completion. A test was run and the well did not give twenty gallons of water per minute.

work was done by Ben Strom according to the terms of the contract. It further appears that thereafter the Liberty Supply and Lumber Company applied to the Calumet Bond and Investment Company for a loan of \$25,000, agreeing to place the \$25,000 note and trust deed executed by Malick and his wife, as collateral security for the loan. The president of the bond company, before accepting the collateral examined the premises in question and found the building in the process of construction. The loan was accepted and the \$25,000 note and trust deed were placed as collateral security for the loan and \$2,000 advanced to the Liberty Supply and Lumber Company. At the same time an agreement was made that the Liberty Supply and Lumber Company was to furnish the Calumet Bond and Investment Company with statements showing their liabilities to subcontractors on the job. No further money was paid to the Liberty Supply and Lumber Company on account of the \$25,000 loan as arranged because the statements showing the indebtedness to subcontractors were not furnished. The loan remained in this condition with the \$25,000 note and trust deed as collateral security therefor until September 19th, 1929. The record further discloses that on July 14, 1928, M. G. Ferguson, doing business as M. G. Ferguson and Company, proposed to the Liberty Supply and Lumber Company to dig on the Malick job, a six inch well using National Special water well galvanized pipe at \$2.75 per foot, such well to give a supply of twenty gallons a minute. In August 1928, Ferguson began drilling a well. He worked on it for about two months. When he started a second hole around October 1st, 1928, cutting it down ninety feet. A test pump was run for five weeks night and day but the water did not clear. In January 1929 the pipe was connected to one hundred and seventy-seven feet when it was temporarily connected to the building which was then nearing completion. A test was run and the well did not give twenty gallons of water per minute.

On February 26th, 1929, the oil burner blew up and the pump was shut off. It remained in that condition until March 1929. From the latter part of May 1929 to August 21st, 1929, the well was continued to a depth of two hundred and thirty-one feet, the air compressor mounted, electrical control installed, the floor of the well concreted and made water proof and the pump taken off the blocks and placed in the well. The well was cased with six inch National Special water well galvanized pipe, was two hundred and thirty-one feet deep and pumped twenty gallons of water per minute. Ferguson furnished, at the request of the contractor, a pumping outfit at \$140.00, a five hundred and twenty-five gallon tank at \$75.00, and dynamite to the extent of \$14.00.

Statutory notice was served on Malick August 22nd, 1929, and leave of court to file his intervening petition was granted on December 19th, 1929, and same was filed on that date.

The record further discloses that at about the time Sandstrom completed his original contract he undertook to furnish extra and additional material and labor to erect a sidewalk around the building, a cement drive under the canopy and a concrete border for a flower bed, and the Liberty Supply and Lumber Company agreed to pay therefor the cost price plus ten per cent. Sandstrom employed assistants and completed the work. The cost price to Sandstrom of the materials and labor used in the additional work plus ten per cent as agreed was \$458.43. Sandstrom received from the Liberty Supply and Lumber Company the sum of \$350.00, leaving a balance for the work done on the premises of \$814.95. Sandstrom served Malick with a notice of his claim for lien on the 9th day of November, 1928. On or about the 15th day of October, 1928, the Liberty Supply and Lumber Company employed Steve Rynskel and M. C. Synskel, partners, doing business as the Rynskel Coal Company, to deliver material at an agreed price. Deliveries were commenced on October 17th, 1928, and

On February 28th, 1928, the oil burner blew up and the pump was
shot off. It remained in that condition until March 1928. From
the latter part of May 1928 to August 21st, 1928, the well was
continued to a depth of two hundred and thirty-one feet, the six
compressor mounted, electrical control installed, the floor of the
well concreted and made water proof and the pump taken off the
blocks and placed in the well. The well was cased with six
inch National Special water well casement pipe, was two hundred
and thirty-one feet deep and pumped twenty gallons of water per
minute. Ferguson furnished, at the request of the corporation, a
pumping outfit at \$140.00, a five hundred and twenty-five gallon
tank at \$75.00, and dynamite to the extent of \$14.00.
Statutory notice was served on Allick August 28th, 1928,
and leave of court to file his intervention petition was granted
on December 19th, 1928, and same was filed on that date.
The record further discloses that at about the time Sandstrom
completed his original contract he undertook to furnish extra
and additional material and labor to erect a sidewalk around
the building, a cement drive under the canopy and a concrete
border for a flower bed, and the Liberty Supply and Lumber Company
agreed to pay therefor the cost price plus ten per cent. Sandstrom
employed assistants and completed the work. The cost price to
Sandstrom of the materials and labor used in the additional work
plus ten per cent as agreed was \$488.47. Sandstrom received
from the Liberty Supply and Lumber Company the sum of \$520.00,
leaving a balance for the work done on the premises of \$314.75.
Sandstrom served Allick with a notice of his claim for fees on
the 24th day of November, 1928. On or about the 15th day of
October, 1928, the Liberty Supply and Lumber Company employed
Steve Rynskel and M. W. Rynskel, carpenters, doing business as
the Rynskel Lumber Company, to deliver material at an agreed
price. Deliveries were commenced on October 17th, 1928, and

continued until November 24th, 1928, the date of the last delivery. Each delivery was receipted for by some one on the premises on a delivery ticket. There became due to the Rynskel Brothers the sum of \$1727.16. Nothing was paid on this sum except a credit memorandum for \$33.72 to correct an error in the charging. Malick, the owner of the premises being improved, was not a resident of Lake County until after January 1929, and so the Rynskels gave notice of their lien by filing in the office of the clerk of the Circuit Court, on the 19th day of January, 1929, a claim for lien. Bills were filed by Sandstrom and Rynskel Brothers respectively. At the time each bill was filed the Liberty Supply and Lumber Company was the owner of the \$25,000 trust deed and note now held by the plaintiff in error Schottler, and which was held by the Calumet Bond and Investment Company as collateral on the loan. The Calumet National Bank answered in both suits claiming to be the owners of the \$25,000 trust deed. The Liberty Supply and Lumber Company answered admitting that it was a general contractor and that it entered into contracts with the respective claimants, and in Sandstrom's case alleged the work was not done in a workmanlike manner. The issues were made and the cause was referred to the Master. The first hearing was had before the Master on August 30th, 1929. Thereafter, Edward G. Schottler, plaintiff in error, acquired the \$25,000 note and trust deed. On September 12th, 1929, he petitioned the court to become a party and to defend and thereafter filed a joint answer with the Calumet National Bank. Later on E. H. Johnson, trustee in bankruptcy of the Liberty Supply and Lumber Company, filed an intervening petition, claiming to own the \$25,000 trust deed and note subject only to the claims which might be approved by the court as having precedence over his claim.

The cause was heard. A decree was entered in favor of Sandstrom for \$904.59; of Rynskel Brothers for \$1854.31, and M. G. Ferguson for \$1148.83, respectively, and affirming their liens

continued until November 2nd, 1928, the date of the last delivery.
Each delivery was requested for by some one on the premises on a
delivery ticket. There became due to the Ryndel Brothers the
sum of \$1737.18. Nothing was said on this account a credit
was not made for \$3.73 to correct an error in the charging. Notice
the owner of the premises being involved, was not a resident of
Lake County until after January 1929, and on the Ryndel gave
notice of their lien in the office of the clerk of the
Circuit Court, on the 15th day of January, 1929, a return for lien
bills were filed by Sandstrom and Ryndel Brothers respectively.
At the time each bill was filed the Liberty Supply and Lumber
Company was the owner of the \$25,000 trust deed and note now held
by the plaintiff in error Sandstrom, and which was held by the
Columbus Bond and Investment Company as collateral on the loan.
The Columbus National Bank answered in both suits claiming to be
the owner of the \$25,000 trust deed. The Liberty Supply and
Lumber Company answered admitting that it was a general com-
missioner and that it entered into contracts with the respective
claimants, and in Sandstrom's case alleged the work was not done
in a workmanlike manner. The issues were joined and the cause was
referred to the Master. The first hearing was had before the
Master on August 30th, 1929. Thereafter, Edward G. Schottler,
plaintiff in error, recalled the \$25,000 note and trust deed. On
September 15th, 1929, he petitioned the court to become a party
and to defend and thereafter filed a joint answer with the Columbus
National Bank. Later on E. W. Johnson, trustee in bankruptcy of
the Liberty Supply and Lumber Company, filed an intervening
petition, claiming to own the \$25,000 trust deed and note and
only to the claims which might be approved by the court as having
precedence over his of his.

The cause was heard. A decree was entered in favor of
Sandstrom for \$204.28; of Ryndel Brothers for \$151.51, and W.
G. Ferguson for \$148.25, respectively, and affirming their liens

on the premises for the amounts due as prior and superior to the lien of the \$25,000 trust deed, and ordering a sale, etc.

The plaintiffs in error who seek to reverse the decision assigned seventy-two errors. They have, however, not argued but a limited number of them and we take it, under the rule, those not argued are waived.

The plaintiffs in error have not contested the amounts due the subcontractors, defendants in error, for the work done by them on the premises in question. They have not questioned the work or quality of material furnished, nor the charges therefor. They have presented to the court only questions affecting the validity of the liens of the subcontractors.

It is the contention of the defendants in error that the holder of the trust deed and note is estopped to deny the validity of the liens of the defendants in error. This is based upon the theory that at the time the Sandstrom and Rynskel bills were filed the Liberty Supply and Lumber Company, the principal contractor, was the owner of the \$25,000 note and trust deed executed by Malick which had been delivered to it by the owner on May 28th, 1928, to secure payment of the building thereafter to be erected on the premises in controversy. At that time and until the first hearing before the Master, the note and trust deed were held by the Calumet Bond and Investment Company with notice that it was a building loan as collateral security for a loan it had made to the Liberty Supply and Lumber Company, whereby the last named company received only \$5,000. Long after the suits were commenced Schottler acquired this loan and the collateral security. As to just what Schottler paid for the collateral security the record is rather indefinite. From the above it is shown that the contractor has not been paid in cash but that his claim and his lien upon the premises has been surrendered, and there has been substituted in lieu thereof the lien of the trust deed to secure the payment of the note given for the contract price. Schottler acquired

on the premises for the amount due as prior and superior to the

lien of the \$25,000 trust deed, and ordering a sale, etc.

The plaintiff in error who seeks to reverse the decision

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the validity of the liens of the subcontractors.

It is the contention of the defendants in error that the

holder of the trust deed and note is estopped to deny the validity

of the liens of the defendants in error. This is based upon the

theory that at the time the Gamstrom and Ryndal bills were

filed the Liberty Supply and Lumber Company, the principal con-

tractor, was the owner of the \$25,000 note and trust deed execut-

ed by Salick which had been delivered to it by the owner on

May 28th, 1925, to secure payment of the building contract to be

erected on the premises in controversy. At that time and until

the first hearing before the Master, the note and trust deed were

held by the Capital Bond and Investment Company with notice that

it was a building loan as collateral security for a loan it had

made to the Liberty Supply and Lumber Company, whereby the last

named company received only \$5,000. Soon after the suits were

commenced Schottler acquired this loan and the collateral security.

As to what Schottler said for the collateral security the

record is rather indefinite. From the above it is shown that the

contractor has not been paid in cash but that the claim and the

lien upon the premises has been surrendered, and there has been sub-

stituted in lieu thereof the lien of the trust deed to secure the

his interest in the subject matter during the pendency of this cause. He stands in no better position than did the owner and holder of the trust deed and note at the time the suits were instituted. The trustee in bankruptcy of the Liberty Supply and Lumber Company has intervened claiming to own the note and trust deed and that the same had been sold after the Liberty Supply and Lumber Company had repudiated the collateral agreement because of the failure of the Calumet Bond and Investment Company to advance the rest of the money.

The subcontractors have not been paid. In view of that fact it seems reasonable that the principal contractor or his assigns, being holder of the note and trust deed in question, who hire mechanics to furnish labor and material to assist him to complete his contract and fail to pay them, is estopped to deny the validity of their liens when they are forced to go into court to obtain relief. He could question the quantity or the quality of the work and material and the charges therefor, but to permit him to contest the validity of the liens, if he is successful, would permit him or his assigns to repudiate the contract to pay the subcontractors, at the same time retaining the benefits of their work and materials furnished on the premises and collecting therefor from the owner the full contract price, without liability to reimburse the subcontractors out of which the principal contractor collects. Because the trust deed and note, which was deposited with the Calumet Bond and Investment Company as collateral security for the Liberty Supply and Lumber Company's \$16,000 note, was the note of a third person, Malick, a creditor of the Liberty Supply and Lumber Company so holding the collateral may collect the whole amount due from the maker assuming that the building has been subsequently completed, and will hold any surplus above his debt as trustee for his debtor to be settled between them. Peacock vs. Phillips, 247 Ill. 467-472.

his interest in the subject matter during the pendency of this case. He stands in no better position than did the owner and holder of the trust deed and note at the time the same were executed. The trustee in bankruptcy of the Liberty Supply and Lumber Company has intervened claiming to own the note and trust deed and that the same had been sold after the Liberty Supply and Lumber Company had repudiated the collateral agreement because of the failure of the Calumet Bond and Investment Company to advance the rest of the money.

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The Liberty Supply and Lumber Company contracted to pay the sub-contractors for their work and materials furnished on the premises. Liens accrued to each sub-contractor then, by reason of these contracts, carved out of the larger lien of the contractor, which might be perfected by their doing the work and serving the statutory notice. This was induced by the Liberty Supply and Lumber Company. The lien of the trust deed is no better than the contractor's own lien for the work on the premises. The fact that a trust deed has been substituted in the place of his mechanic's lien does not change the nature of the transaction. It therefore appears that there is an attempt to enforce the principal contractors claim against the premises and collect from the owner for all of the work furnished by the sub-contractors without reimbursing them for furnishing the same. By defeating these liens upon these technical grounds, the holder of the note and those he represents are the only ones benefited, for the reason that the owner of the property is bound to pay the notes secured by the trust deed thereby paying the contractor the contract price, assuming, of course, that the building has been subsequently completed. This estoppel is mutual. It may operate against the sub-contractor as well as in his favor. In *Commercial Loan Association vs. Trevette*, 160 Ill. 390, the contractors, who by concealing an additional contract for the third story of a building had obtained from the loan association the full proceeds of the loan, and were held to be equitably estopped from asserting their lien to the prejudice of the Loan Association. At page 393 the court said: "Any act which will render it inequitable for a party to enforce his lien may operate as an estoppel in equity, and if the party act falsely and his act in effect constituted a fraud upon the other party, it will be immaterial whether the particular injury inflicted was intended or not. *Heidenbloth vs. Rudolph*, 152 Ill. 316." While the rights of the Calumet Bond and

The Liberty Supply and Lumber Company contracted to pay the sub-contractors for their work and materials furnished on the premises. Liens accrued to each sub-contractor from the reason of these contracts, carved out of the larger lien of the contractor, which might be perfected by them doing the work and serving the statutory notice. This was noticed by the Liberty Supply and Lumber Company. The lien of the trust deed is no better than the contractor's own lien for the work on the premises. The fact that a trust deed has been substituted in the place of the mechanic's lien does not change the nature of the transaction. It therefore appears that there is an attempt to enforce the lien of the contractor's claim against the premises and collect from the owner for all of the work furnished by the sub-contractors without reimbursing them for furnishing the same. By debiting these liens upon these technical grounds, the holder of the note and those he represents are the only ones benefited, for the reason that the owner of the property is bound to pay the note secured by the trust deed thereby paying the contractor the contract price, assuming, of course, that the building has been substantially completed. This estoppel is mutual. It may operate against the sub-contractor as well as in his favor. In Commercial Loan Association vs. Brewster, 160 Ill. 306, the contractor, who by cancelling an additional contract for the third story of a building had obtained from the loan association the full proceeds of the loan, and was held to be estopped from asserting their lien to the prejudice of the loan association. At page 309 the court said: "Any act which will render it ineffectual for a party to enforce his lien may operate as an estoppel in equity, and if the party act falsely and his act in effect constituted a fraud upon the other party, it will be ineffectual whether the particular injury inflicted was intended or not. Commercial Loan Association vs. Brewster, 160 Ill. 316." While the rights of the contractor and

Investment Company are involved they do not affect the sub-contractor's liens as said company had notice of the construction before making the loan to the Liberty Supply and Lumber Company, and protected themselves by requiring a contractor's statement of liability to the sub-contractor from the contractor. The Bond Company occupies no better position than if the Liberty Supply and Lumber Company had assigned to the bond company the money that would become due under the construction contract for that is in effect what was done.

"An equitable estoppel depends upon the facts of the particular case. The general rule is, that where a party by his statements and conduct leads another to do something he would not have done but for such statements and conduct, the guilty party will not be allowed to deny his utterances or acts to the loss or damage of the other party." *Neidhardt vs. Frank*, 325 Ill. 596.

"Fraud is a necessary element of estoppel but it is not essential that there be a fraudulent intent. It is sufficient if a fraudulent effect would follow allowing a party to set up a claim inconsistent with his former declarations." *Bondy vs. Samuels*, 333 Ill. 535-546.

If a court of equity will permit a contractor to contract with sub-contractors and agree to pay them, and later repudiate his agreement to pay the sub-contractors, this will open up the door to fraud. The contractor, by making himself judgment proof, can refuse to pay the sub-contractors, forcing them to file bills. If he be then permitted to contest the liens solely on the ground of their invalidity, he can escape payment of the sub-contractors just claims, and at the same time enjoy the benefit of their work and material furnished under his contract by collecting the amount of his contract price from the owner. Without quoting further from authorities we think that this contention is based on sound reason and common sense.

Investment Company are involved they do not affect the sub-con-
tractor's claim as such company had notice of the construction
before making the loan to the borrower, namely the contractor.
The contractor protected themselves by requiring a letter from the lender
stating that the sub-contractor was not the contractor. The lender
Company occupies no better position than if the borrower had
and the Investment Company had assigned to the lender the money
that would become due under the construction contract for that
in effect what was done.

An equitable estoppel against the lender of the money
does not exist. The lender who is, in effect, a lender of his money
cannot sue the contractor for the money he lent, but
he can sue for each statement and conduct, the liability being
will not be allowed to deny his utterances or acts for the loss or
damage of the other party." *Welding vs. Frank, 333 Ill. 3-8.*

"There is a necessary element of estoppel and it is not
essential that there be a fraudulent intent. It is sufficient
if a fraudulent effect would follow allowing a party to set up a
claim inconsistent with his former declarations." *Boyd vs. Smith,*
333 Ill. 333-346.

If a court of equity will permit a contractor to contract
with sub-contractors and cause to pay them, and later repudiate
his agreement to pay the sub-contractors, this will cause an
injustice to them. The contractor, by making himself responsible
to them, can refuse to pay the sub-contractors, leaving them to the
will. If he be then permitted to contract with these sub-con-
tractors on the ground of their insolvency, he can cause a loss to the
contractors just claims, and at the same time enjoy the benefit of
their work and material furnished under the contract by withholding
the amount of his contract price from the owner. Without making
further from authorities we think that this contention is based
on sound reason and common sense.

Whatever may be the rule with reference to the question of an estoppel as insisted upon by defendants in error, it is quite apparent to us, from the facts as disclosed by the record, that the Mechanic's Lien Law was complied with by the respective sub-contractors. We are familiar with the rule relative to the construction to be given the lien law. The rule is well settled in *Culver vs. Schroth*, 153 Ill. 437, at page 446 where the court said: "This court has adopted and has always adhered to the rule that the Mechanic's Lien Law, being in derogation of common right, should be strictly construed, but at the same time the construction to be given to them should be reasonable, and not such as to render them practically inoperative and ineffectual."

The record shows that Sandstrom was originally employed by the Liberty Supply and Lumber Company to construct the cement foundation and floor for the building being erected on the premises in question. For this he was to be paid \$700. After he had completed his work under the contract the Liberty Supply and Lumber Company contracted with him for extra and additional work and materials to construct a sidewalk around the building, a cement drive under the canopy and a flower box at cost to him plus ten per cent. He furnished the labor and material that entered into the construction and paid those who had furnished him with material. Plaintiffs in error do not dispute that the sidewalk, drive way and flower box were constructed by him in a workmanlike manner, but contend that the finding of the Master and the Chancellor that the last work was done on the premises on the 13th day of September is not supported by a preponderance of the evidence. The question is, was the concrete sidewalk, driveway and border around the flower bed complete when the concrete was poured into the forms and leveled off, or was it complete after the concrete had hardened and the forms had been removed. The assertion made by opposing counsel that Sandstrom's men finished pouring concrete into the

Whatever may be the rule with reference to the question of an estoppel as limited upon by discharges in equity, it is not to be taken to us, from the facts as disclosed by the record, that the Mechanics' Lien Law was cancelled (1) by the respective provisions of the statute. We are familiar with the rule applied in the case of *Union v. Roberts*, 125 Ill. 457, at page 448 where the court said: "This court has adopted and has always adhered to the rule that the Mechanics' Lien Law, being in derogation of common right, should be strictly construed, and at the same time the construction to be given to these words is reasonable, and not such as to render them practically inoperative and ineffectual." The record shows that construction was rightly employed by the liberty surely and lawfully necessary to construct the contract of construction and floor for the building being erected on the premises in question. For this he was to be paid \$700. After he had completed his work under the contract the Liberty Bank and Trust Company contacted with him for extra and additional work and materials to construct a sidewalk around a building, a contract to be made under the company and a floor for it and to be paid for per cent. He furnished the labor and material that cost him \$100.00 the construction and with those who had furnished him with materials. Plaintiffs in error to not dispute that for sidewalk, driveway and floor were constructed by him in a reasonable manner, but contend that the finding of the master and the Chancellor that the last work was done on the premises on the 15th day of December is not supported by a preponderance of the evidence. The sidewalk, as was the concrete sidewalk, driveway and floor around the floor had been completed when the concrete was poured into the form and leveled off, or was in complete after the concrete had hardened and the forms had been removed. The assertion made by plaintiffs counsel that construction was finished before concrete was laid

forms on the week ending September 6, 1928, is a reasonable conclusion from the evidence. But the contention that the labor employed in removing the forms a week later after the concrete had hardened was not an element that entered into the completion of the sidewalk, driveway and flower beds, is not tenable. If the contractor had not returned to remove the forms, would the job be complete? Did the principal contractor contract for concrete work permanently reinforced with forms, or concrete work that would stand by itself? There are so many elements that could injuriously affect the concrete between the time that it was poured and that time that it had hardened, that the removal of these forms was essential, if for no other reason, to determine that it had been properly treated and installed in a workmanlike manner.'

Section 24 of the Mechanic's Lien Law Act provides, among other things, that the sub-contractors shall, within sixty days after completion of the contract, or if extra or additional work or material is delivered thereafter, within sixty days after the date of completion of such extra or additional work or final delivery of such extra or additional material, cause a notice of his claim to be served upon the owner. With the provisions of this statute in mind and from what has already been shown as to the time of the rendering of the services and the furnishing of the materials, Sandstrom's notice of his claim was served within the time as required by the statute.

Relative to the claim of Ferguson plaintiffs in error raise no question that the well dug by him was not satisfactory in every respect. The sole contention of plaintiffs in error with respect thereto appears to be entirely a question of fact, to-wit: The date of the last work under the contract necessary to make the well a complete job. The facts as already stated, and the record shows, that the well was completed under the contract on August 21st, 1929, the date found by the Chancellor. Personal service of the owner of the notice required by the statute was had on

forms on the west ending September 6, 1929, as a reasonable estimate from the evidence. But the contention that the labor employed in removing the forms a week later after the concrete had hardened was not an element that entered into the calculation of the allegedly, driveway and flower beds, is not reasonable. If the contractor had not returned to remove the forms, would the job be completed? Did the principal contractor contract for concrete permanently reinforced with forms, or concrete work that would stand by itself? There are no such elements that could injure or affect the concrete between the time that it was poured and the time that it had hardened, that the removal of these forms was essential, if for no other reason, to determine that it had been properly treated and installed in a workmanlike manner.

Section 24 of the mechanic's Lien Law Act provides, among other things, that the contractor shall, within sixty days after completion of the contract, or if extra or additional work or material is delivered thereafter, within sixty days after the date of completion of such extra or additional work or material, or delivery of such extra or additional material, serve a notice of his claim to be served upon the owner. With the provisions of this statute in mind and knowing that had been shown as to the time of the rendering of the services and the furnishing of the materials, Senator's notice of his claim was served within the time as required by the statute.

Relative to the claim of Thompson identified in error raise no question that the well dug by him was not satisfactory in every respect. The sole contention of Plaintiff is that the record thereto appears to be entirely a question of fact, to-wit: The date of the last work under the contract necessary to dig the well a complete job. The facts as already stated, and the record shows, that the well was completed under the contract on August 21st, 1929, the date found by the Ontario Court. Formal service of the owner of the notice required by the statute was had on

August 22, 1929, and leave of court was granted Ferguson to file his answer in the nature of an intervening petition on December 19th, 1929, and such answer was filed on said date.

As to the claim of Rynskel Brothers the first contention made by the plaintiffs in error is that the allegations contained in the bill concerning the lien notice were insufficient to show facts essential to give the court jurisdiction over the subject matter and that there is a variance between the bill and the decree and proof. It is contended by the plaintiffs in error that the proof shows that the notice of claims for lien was filed on January 19th, 1929. The allegations in the part of the bill in question are that the date of the last delivery was on November 24th, 1928, and that the complainants on the 19th day of January 1928, the same being a day within sixty days after the date of the last delivery aforesaid, gave notice as required by the statute in such a case made and provided by filing in the office of the clerk of the Circuit Court of Lake County, Illinois, a claim for lien, duly verified by affidavit, which said claim was then and there filed by the Circuit Clerk. Exhibit "B" attached to the bill shows that the affidavit verifying the claim was sworn to before Reginald D. Hulse, a notary public, on January 19th, 1929. On the face of the bill there appears a discrepancy. Obviously January 19th, 1928, is not within sixty days after November 24th, 1928; but the Exhibit itself shows it sworn to before a notary public on January 19th, 1929, and the statement says that the last material was delivered on the 24th day of November, 1928, pursuant to a contract that was made in June 1928. The claim itself is endorsed: "Gen. No. 21557-- Filed at 3 o'clock P.M. this 19th day of January, A.D. 1929--L. J. Wilmot, Clerk." It therefore would seem to follow as an irresistible conclusion that the mistake is purely a clerical error and that in typing the bill an "8" was inserted in the place of a "9". The entire allegation when read together simply means that the claim for lien was filed as required by statute.

In Drollinger vs. Cowen, 251 Ill. App. 215, the bill contained the allegation: "That they filed their notice of claim for lien * * * * within the statutory time in the Circuit Court of Lake County in such case made and provided." A general demurrer was sustained to the bill and the defendants, purchasers of the premises, sought to sustain the ruling on account of the insufficiency of the allegation concerning notice. The court on page 219 said: "If a special demurrer had been interposed pointing out the defects in the bill in this respect, we have no doubt it would have been properly sustained. A general demurrer however was not sufficient."

In Beaudry vs. Bell, 250 Ill. App. 468, the bill of complaint contained no allegation as to the date of the completion of the work. In that case the court on page 472 said: "There was attached to the bill of complaint as Exhibit "B" a copy of the statement of claim filed by the complainant in the office of the clerk of the Circuit Court. This exhibit, by appropriate allegation, was incorporated in the bill, and stated when the work and the furnishing of materials were completed. This, it has been held, was sufficient to supply the deficiency in the pleading." Without citing further authorities we think this objection is without merit. There is enough shown by Rynskel Brothers in their bill, together with the exhibit attached thereto, to give the court jurisdiction and authority to act upon the same.

The decree is attacked by the plaintiffs in error on the ground that the liens are held to be prior to the lien of the trust deed in question, and cases are cited in support of their contention. The cases relied upon by plaintiffs in error deal with a situation where a mortgage was "a previous encumbrance" within the meaning of Section 16, chapter 82, Smith-Hurd Rev. Statutes 1929. In each case cited the trust deed was a lien on the real estate before the contract was made with the mechanics for their

In *DeWitt v. State*, 150 Ill. App. 2d 111, 112, the court
contained the following statement: "The court is not
for the purpose of determining the validity of the
of Lake County in such cases and is not required to
thereof and is not required to determine the validity of the
of the premises, except to determine the validity of the
validity of the allegations concerning the same. The court in
page 219 said: 'It is a well-known fact that the validity of
ing out the defects in the bill in this respect, as there is no
it would have been properly established. A general statement that
ever was not sufficient.'"

In *DeWitt v. State*, 150 Ill. App. 2d 111, 112, the court
contained no allegation as to the validity of the commission of the
work. In that case the court said: "There is
attached to the bill of complaint an exhibit 'B' a copy of the
statement of claim filed by the defendant in the office of the
clerk of the Circuit Court. This exhibit, by way of
allegation, was incorporated in the bill, and stated that the
work and the furnishing of materials were completed. This, it
has been held, was sufficient to establish the defendant in the
allegation. Without citing further authorities we think this
allegation is without merit. There is enough shown by the bill
together with the exhibit to establish the defendant in the
to, to give the court jurisdiction and authority to set aside the
same."

The decree is affirmed on the grounds that the bill is
grounded on the fact that the defendant is not a party to the
trust deed in question, and there was cited in support of this
contention. The decree is affirmed upon the grounds that the bill is
a situation where a mortgage was "a previous encumbrance" within
the meaning of Section 15, Chapter 15, Illinois Compiled Statutes
1953. It was also held that the bill was a bill on the bill
before the court and that the defendant was not a party to the

services. Therein lies the difference between the cases cited and the case at bar.

In the instant case Malick entered into negotiations with the Liberty Supply and Lumber Company in April or May of 1928 for the erection of improvements upon the premises and entered into a contract with the company for the erection of a building thereon at a cost of \$25,000. After this contract was made and before the work started, Malick and his wife executed the \$25,000 note and trust deed and delivered it to the Liberty Supply and Lumber Company to secure the payment for the building thereafter to be erected. The trust deed was recorded three days later on May 31st, 1928. The Liberty Supply and Lumber Company then undertook the erection of the building and the improvements. Around July 17th, 1928, the Liberty Supply and Lumber Company applied to the Calumet Bond and Investment Company for a loan of \$16,000, offering to pledge as collateral security for the loan the \$25,000 trust deed. Before accepting the loan the president of the bond company made a trip to the premises to inspect the building which was in process of erection. Thereafter the loan was granted and the note of the Liberty Supply and Lumber Company for \$16,000 was given to the bond company and the \$25,000 trust deed and note was pledged with it as collateral security for the loan. Out of the proceeds of the loan so made the bond company paid to the Liberty Supply and Lumber Company the sum of \$5,000, retaining the balance until after the Liberty Supply and Lumber Company furnished to the bond company a statement showing its liability to sub-contractors. It is quite apparent that this was done because the bond company knew the value of the securities so pledged depended on paying off the sub-contractors who had a prior lien on the premises. This statement was never furnished to the bond company so they did not pay the Liberty Supply and Lumber Company any more money on the account. The decree on this branch of the case is supported by authority.

serviced. Therein lies the difference between the two cases and the case at hand.

In the instant case Malik entered into negotiations with the Liberty Supply and Investment Company for the purpose of the erection of improvements upon the premises and entered into a contract with the company for the erection of a building thereon at a cost of \$25,000. After this contract was made and while the work started, Malik and his wife executed the \$25,000 note and trust deed and delivered it to the Liberty Supply and Investment Company to secure the payment for the building construction to be erected. The trust deed was recorded prior to the date of July 1st, 1928. The Liberty Supply and Investment Company was notified of the erection of the building and the record was made. Around July 15th, 1928, the Liberty Supply and Investment Company applied to the Circuit Court and Investment Company for a loan of \$10,000, offering to pledge as collateral security for the loan the \$25,000 trust deed. Before accepting the loan the president of the said company made a trip to the premises to inspect the building and was in possession of execution. Thereafter the loan was made and the note of the Liberty Supply and Investment Company for \$10,000 was given to the loan company and the \$25,000 trust deed was also attached with it as collateral security for the loan. Out of the proceeds of the loan so made the loan company paid to the Liberty Supply and Investment Company the sum of \$10,000, retaining the balance until after the Liberty Supply and Investment Company had paid in full the \$25,000 note. It is a statement showing the liability to the loan company. It is quite apparent that this was not done by the loan company. It is known the value of the securities as pledged was equal to the value of the loan and that a value was given to the securities. The statement was never received by the loan company and they did not pay the Liberty Supply and Investment Company any more money on the account. The record on this matter of the case is recorded by authority.

In Pittsburgh Plate Glass Company vs. Kransz, 291 Ill. 84, Boss, the owner, on January 15th, 1916, executed to Henry P. Kransz notes and a trust deed for the purpose of procuring what is called a building loan as is the one in this case. On March 15th or 16th Boss contracted with Huberty and Lohenrich to erect the improvement. Thereafter the contractor made contracts with the sub-contractors, the defendants in error. The trust deed held by Kransz to secure the money he was to advance to pay for the building as it progressed, which was executed on January 15th, 1916, was recorded on April 18th, 1916, and the first money advanced thereunder was on April 21st, 1916, - - the sum of \$88.40, and again on May 3rd the sum of \$2197.55. Thereafter the sub-contractors completed performance on June 23rd, July 7th, July 18th and June 30th, respectively. The decree entered declared the sub-contractors' liens to be prior to the liens of the Kransz trust deed. The court approved of that provision of the decree holding the subcontractors liens to be prior to the lien of the Kransz trust deed and at page 89 the court said: "Some confusion has arisen as to when the lien arises and whether it exists before the statutory notice is given. That question received the consideration of this court in Brown Construction Co. vs. Central Illinois Construction Co., 234 Ill. 397. It was there said: "In proper cases the lien exists whether notice is given or not. The proviso in section 9 that the lien shall not attach unless notice shall have been served or filed, 'simply means that the incipient or inchoate lien of the sub-contractor will cease, - - not 'attach' to the property in the sense of becoming a fixed lien thereon, '- - if the notice prescribed by the statute be not given. (St. Louis and Peoria Railroad Co. vs. Kerr, 153 Ill. 182). As is said in that case, any other construction of the statute would render it inoperative, because it would make the statutory lien subject to any other lien placed upon the property, or any conveyance thereof made, after the beginning of the work and before the notice was served or filed."

(See also, Boyer v. Keller, 253 Ill. 106; Rittenhouse & Embree Co. vs. Warren Construction Co., 264 id. 619.) The lien given by the statute exists from the date of the original contract, but notice of the claim of lien must be given within the time required by the statute to preserve and enforce it. The liens of defendants in error were not defeated by the original contractors being adjudged bankrupts."

In Boyer v. Keller, 253 Ill. 106, the court at page 115 said: "The lien given by the statute to a mechanic or material-man for work done or material furnished in the erection or repair of a building will attach from the date of the contract, and whoever purchases the property after the contract is made, purchases subject to the lien under that contract and is bound by it. Clark vs. Moore, 64 Ill. 273; Springer vs. Kroeschell, 161 id. 358."

Other cases are cited sustaining the contention of the defendants in error relative to the decree entered by the chancellor being a prior lien to that of the plaintiffs in error.

We have examined the other questions argued by the plaintiffs in error. Of the seventy-two errors assigned but few are argued.

We conclude, therefore, that the decree entered by the chancellor was right and it is therefore affirmed.

Decree affirmed.

Other cases are cited establishing the construction of the above
vs. No. 66 Ill. 273; *Primer vs. Knochel*, 101 Ill. 273.

subject to the lien under that contract and in favor of the
ever purchase the property after the contract is made, and
of a building will attach from the date of the contract, and
for work done or material furnished in the erection or repair
The lien given by the statute is a lien in rem.

Is *Boyer v. Kelley*, 253 Ill. 108, and *Wright v. Kelley*, 253 Ill. 108.

It is concluded, therefore, that the forces involved in the reaction are of the same order of magnitude as the forces involved in the reaction of the same order of magnitude.

1871-1872

STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and thirty-_____

Clerk of the Appellate Court

727
AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the second day of February, in the year of our Lord one thousand nine hundred and thirty-two, within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.

Hon. FRED G. WOLFE, Justice.

Hon. JAMES S. BALDWIN, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

265 I.A. 616²

BE IT REMEMBERED, that afterwards, to-wit: On

MAY 15 1932 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

George Lauffer,

Plaintiff in error,

vs.

Error to Circuit Court of

Will County

Al Steel,

Defendant in error,

JETT, P.J.

This suit was instituted by George Lauffer, plaintiff in error, hereinafter referred to as plaintiff, against Al Steel, defendant in error, hereinafter called defendant, in the circuit court of Will County to recover damages for the alienation of the affections of his wife by the defendant.

A jury trial was had resulting in a finding in favor of the defendant, judgment against plaintiff for costs of suit. The plaintiff prosecutes this writ of error.

The declaration originally consisted of one count which was filed on April 20th, 1928. On May 7th 1930 leave was obtained and an additional count was filed. To the original declaration the defendant pleaded the general issue. After the additional count was filed the general issue was re-filed.

In the declaration it is averred that the defendant alienated the love and affections of the wife of the plaintiff, confessed affection for her, made love to her, and wrongfully sought and obtained her confidence, and wickedly, advised, persuaded and induced her to separate from and abandon her husband, the plaintiff.

George Lauffer, the plaintiff, was married to his former wife about eighteen years before the bringing of this suit; they lived on a farm in Will County; in the fall of 1925 the plaintiff hired the defendant, as a farm hand, to work for him; the defendant worked for the plaintiff for about one year; trouble arose between the husband and wife and they separated; she later filed a bill and procured a divorce from him in which cause he made no contest.

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This suit was instituted by George Jacobson, of Seattle, in 1907, hereinafter referred to as plaintiff, against the defendant in error, Westchester called defendant, in the district court of Will County for recovery damages for the alleged tortious destruction of his wife by the defendant.

[illegible]

The description originally consisted of one round which was fired on April 20th, 1968. On May 24th 1968 there was a second round and an additional count was taken. In the original description the defendant placed the round in the barrel. After the second round was fired the second count was taken.

In the declaration it is averred that the defendant attempted
the law and will obtain by the aid of the plaintiff's confidential
attorney for her, made love to her, and procured her to have
sexual intercourse with him, and thereby, unlawfully, obtained and
induced her to separate from and abandon her husband, the plaintiff.
George Lindley, the plaintiff, was married to his wife

George Mather, the plaintiff, was married to his second wife about fifteen years before the date of this case; they lived on a farm in Will County; in the fall of 1905 the defendant along the defendant, as a farm hand, to work for him; the defendant asked for the plaintiff for about one year; then a quarrel between the husband and wife and they separated; the wife lived in Will County and married a divorcee from his in which decree he was exonerated.

While the record does not show, it is evident that she procured the divorce on account of the fault of the plaintiff. The plaintiff claims that because of the children he did not contest the suit and made a settlement of the property rights and for the custody of the children. The wife of the plaintiff procured a divorce from him in May 1927; she and the defendant were married on or about the 8th day of October, 1928, and the plaintiff took unto himself a second wife on October 17, 1928.

A number of reasons are assigned by the plaintiff for a reversal of the judgment. It is first contended by the plaintiff that the court erred in permitting the introduction of irrelevant and remote testimony. The court allowed witnesses to testify to controversies between the plaintiff and his wife occurring a number of years prior thereto. Just the exact time the record fails to disclose but it appears it was ten or twelve years previous to the trial of the case. The testimony complained of is no doubt quite remote but we think it could be considered to determine whether it had any bearing on the relations of the former husband and wife, whether she had affection for him at the time she left him, and the weight of it was for the jury. It was not reversible error to admit the testimony.

The second contention of the plaintiff is that the court improperly instructed the jury. In his argument he fails to mention wherein the court erred in the instructions given to the jury. The plaintiff does, however, argue that the court erred in refusing to give two instructions offered by the plaintiff which were refused. The first refused instruction is covered by other instructions given for the plaintiff. The second refused instruction would have been of no benefit to the jury as there is practically nothing in it not covered by other instructions. We are not prepared to say that the court erred in the refusing of the two instructions complained of by the plaintiff. We have examined the given instructions and are of the opinion that the jury were fully instructed as to the law of the case.

While the record does not show, it is evident that the defendant

the divorce on account of the fault of the plaintiff. The

of fault of the defendant in the divorce on his own part

that the defendant had made a settlement of the property with the

for the custody of the children. The wife of the defendant was

divorced from him in May 1907, and the defendant was

restored on or about the 25th day of October, 1907, and the wife

with her own hands a second wife on October 17, 1907.

A number of persons are assigned by the plaintiff for a

testimony of the defendant. It is first contended by the plaintiff

that the defendant acted in violation of the instructions of

the court and made a settlement. The court allowed a verdict of

fault to the defendant between the plaintiff and the wife

on account of a number of years prior thereto. That the court did

the record fails to disclose but it appears from the record that

years previous to the trial of the case. The defendant was

of it is not doubt quite possible that the wife is now in possession

of the defendant whether it had any bearing on the testimony of

the former husband and wife, whether she had separated from him at

the time she left him, and the weight of it was not the fact. It

was not reversible error to admit the testimony.

The second contention of the plaintiff is that the court

improperly instructed the jury. In the court's opinion it is

contended that the court erred in the instructions given to

the jury. The court instructed the jury that the defendant

was in violation of the law and instructions given to the jury.

that which was required. The first instruction was that

however by other instructions given to the jury. The

second instruction instructed the jury that the defendant was

that he was in violation of the law and instructions given to the

instructions. It was not required to say that the court was

in violation of the law and instructions given to the jury.

plaintiff. We have reviewed the entire testimony and the

the evidence and the jury were fully instructed as to the law

Under the evidence it was for the jury to say whether or not the defendant was guilty of the things complained of against him in the declaration. The fact that the plaintiff did not start his suit until long after he was married the second time, the fact that his wife procured a divorce from him on account of his fault, and the further fact that the only identification of the letters offered in evidence by the plaintiff were the admissions by his former wife to him that the defendant wrote the letters; that the letters introduced by the plaintiff which he claimed to have been written to his wife by the defendant were not originals but copies; that the plaintiff procured the letters from his former wife; that when his wife procured the divorce from him he agreed to destroy the letters but before he destroyed them he made copies of them, were all within the province of the jury to consider. All these facts and circumstances were before the jury. The jury saw and heard the witnesses and thereby had the opportunity to judge of the weight and credit to be given them. The trial court has affirmed their finding. The jury having been properly instructed as to the law of the case, we decline to interfere with their finding.

Judgment of the Circuit Court of Will County is affirmed.

Judgment affirmed.

Under the evidence it was the jury to be decided

or not the defendant was guilty of the crime charged of

against him in the indictment. The fact that the defendant was

not a party to the crime charged in the indictment was

the fact that the defendant was a witness in the case and

his name, and the fact that the defendant was a witness in

the case offered in evidence by the defendant that the defendant

by his former wife in the fact that the defendant was a witness

that the defendant was a witness in the case and that the

to have been a witness in the case and that the defendant was

witness in the case; that the defendant was a witness in the

from his former wife; that the defendant was a witness in the

from his former wife; that the defendant was a witness in the

from his former wife; that the defendant was a witness in the

from his former wife; that the defendant was a witness in the

from his former wife; that the defendant was a witness in the

from his former wife; that the defendant was a witness in the

the opportunity to be a witness in the case and that the

from. The fact that the defendant was a witness in the

having been a witness in the case and that the defendant was

having been a witness in the case and that the defendant was

having been a witness in the case and that the defendant was

having been a witness in the case and that the defendant was

STATE OF ILLINOIS.

SECOND DISTRICT

} ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and thirty-_____

Clerk of the Appellate Court

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the Second day of February, in
the year of our Lord one thousand nine hundred and thirty-two,
within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.

Hon. FRED G. WOLFE, Justice.

Hon. JAMES S. BALDWIN, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

265 I.A. 616³

BE IT REMEMBERED, that afterwards, to-wit: On

MAR 15 1932 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

August Degner

appellant,

vs.

Appeal from the Circuit Court

of Lee County

Charles W. Jeanblanc,

appellee,

JETT, P.J.

The record discloses that on January 2, 1929, M. H. Herrick, a constable, by virtue of an execution issued by W. H. Wellman, a justice of the peace, in favor of Charles W. Jeanblanc, appellee, and against Jesse V. Degner, levied upon certain property in the possession of said execution debtor and advertised the same to be sold, whereupon August Degner, appellant, gave notice to said constable of his claim to the property so levied upon. Upon receiving the notice the constable notified appellee of such claim and the cause was entered by the said justice of the peace on his docket and set for a hearing on January 29, 1929, and appellee and appellant were both notified to that effect.

It appears that on January 29, 1929, at one o'clock P. M. the justice of the peace called the case for trial. August Degner, the claimant, did not appear but the justice proceeded to hear the cause. The constable was sworn and testified. The justice of the peace found there was no proof that the property claimed by the appellant belonged to him and rendered judgment against the said appellant for \$73.25 costs. Execution was issued and levy made. Appellant Degner notified the said Charles W. Jeanblanc that he would appear before Judge William J. Emmerson, a judge of the circuit court, on March 8, 1929, and apply for a writ of certiorari. On March 8, 1929, a petition of Degner, appellant, for a writ of certiorari was presented to the said judge and thereupon an order was entered that the writ of certiorari issue. Bond was fixed, filed and approved. Writ of certiorari was

August Deppner

appellant,

James Lee Deppner

vs.

of Lee County

Charles W. Jeandran,

appellee,

ATTY. P. J.

The record discloses that on January 1, 1929, at 10 o'clock P. M., a constable, by virtue of an execution issued by J. W. Jeandran, a Justice of the Peace, in favor of Charles W. Jeandran, appellee, and against James V. Deppner, levied upon certain property in the possession of said execution debtor and advertised the same to be sold, whereupon August Deppner, appellant, gave notice to said constable of his claim to the property so levied upon. Upon receiving the notice the constable notified appellee of such claim and the cause was entered by the said Justice of the Peace on his docket and set for a hearing on January 22, 1929, and appellee and appellant were both notified to that effect.

It appears that on January 22, 1929, at one o'clock P. M., the Justice of the Peace called the case for trial. August Deppner, the claimant, did not appear but the Justice proceeded to hear the cause. The constable was sworn and testified. The Justice of the Peace found there was no proof that the property claimed by the appellant belonged to him and rendered judgment against the said appellant for \$73.25 costs. Execution was issued and Levy made. Appellant Deppner notified the said Charles W. Jeandran that he would appear before Judge William J. Harrison, a Justice of the Circuit Court, on March 8, 1929, and apply for a writ of certiorari. On March 8, 1929, a petition of certiorari, together with a writ of certiorari was presented to the said Judge Harrison. Thereupon an order was entered that the writ of certiorari issue. Bond was fixed, filed and approved. Writ of certiorari was

issued and summons for appellee. On March 20, 1929, the record of the proceedings and judgment of the justice of the peace were certified to the circuit court and filed by the clerk of said court. On October 25, 1930, appellee moved the circuit court to quash the writ of certiorari and assigned a number of reasons therefor. The motion to quash the writ of certiorari was by the court sustained. From the order sustaining the motion to quash the writ and the quashing of the same the appellant Degner, prosecutes this appeal.

A number of suggestions are made by the appellant for a reversal of the order of the court quashing the writ. The view we take of the case makes it unnecessary to notice all of the reasons assigned by the appellant.

The statute provides that an appeal may be taken in trials of the right of property as in other cases provided the same is prayed for on the day the judgment is entered and a bond filed within five days from the time of entering the judgment. The statute also provides that writs of certiorari may be sued out in a trial of the right of property as in other cases.

Among other things set forth in the petition of the appellant, it is charged that the said judgment against the said August Degner was not the result of negligence on his part for the reason, that is to say; that on, to-wit; the 28th day of January A. D. 1929, at, to-wit; the County of Lee, State of Illinois, prior to the day when said trial of the right of property was to be had, H. A. Brooks, of the City of Dixon, Lee County, Illinois, attorney and counsellor for said Charles Jeanblanc in said matters, and W. F. Hawthorn, of the Village of Ashton, Lee County, Illinois, attorney and counsellor for said claimant August Degner, entered into an understanding and agreement by and between them in their capacities as attorneys as aforesaid respectively, that the said trial of the right of property would not be prosecuted or defend^{ed} on the said 29th day of January, 1929; that said attorneys then and

issued and answers for supplied. On March 20, 1900, the court
of the proceedings and judgment of the trial of the case were
certified to the circuit court and filed for the clerk of said
court. On October 22, 1900, appellee moved the circuit court
to quash the writ of certiorari and had read a number of persons
therefor. The motion to quash the writ of certiorari was by the
court sustained. From the order sustaining the motion to quash
the writ and the granting of the same the appellant desired, prom-
ptly enter this appeal.

A number of suggestions were made by the appellant for
reversal of the order of the court quashing the writ. The ap-
pellee of the case makes it unnecessary to notice all of the
suggestions assigned by the appellant.

The statute provides that an appeal may be taken in trials
of the right of property as in other cases provided for the
law. On the day the judgment is entered and a writ filed
within five days from the time of entering the judgment. The
statute also provides that writs of certiorari may be used only
in a trial of the right of property as in other cases.

Among other things set forth in the petition of the appellant,
it is charged that the said judgment against the said appellant
was not the result of negligence on his part for the reason, that
in so far as that on, to-wit; the 28th day of January A. D. 1900,
at, to-wit; the County of Lee, State of Illinois, under the
day when said trial of the right of property was held, to-wit; at
Brooks, of the City of Dixon, Lee County, Illinois, attorney and
counselor for said Charles Johnson in said matter, and
Hawthorn, of the Village of Adrian, Lee County, Illinois, attorney
and counselor for said appellant, entered into an
understanding and agreement by and between them in their capacities
as attorneys as aforesaid respectively, that the said trial of
the right of property would not be presented or defended on
the said 28th day of January, 1900; that said attorneys then and

there agreed to a continuance of the trial of the right of property aforesaid until a future date for trial, and agreed to inform their respective clients thereof, and that the date for the trial of said cause would be agreed upon by the said attorneys; that the reason for the agreement for the said continuance as aforesaid was that the said H. A. Brooks was engaged for a trial in Freeport, Illinois, on a claim before the arbitrator in a cause pending before the Industrial Commission, on the said January 29, 1929, at the hour the said trial of the right of property was to be held; that the said W. F. Hawthorn, attorney as aforesaid, was engaged for a trial in the City of Belvidere, Illinois, on the said January 29, A. D. 1929, at the hour the said trial of the rights of property was to be had; that the said H. A. Brooks did, in pursuance of said understanding and agreement, refrain from prosecuting the said trial of the right of property on the said 29th day of January, A.D. 1929, and did attend and take part in the said hearing before said arbitrator at Freeport, Illinois on said date; that the said W. F. Hawthorn did in pursuance of said understanding and agreement, refrain from defending at the said trial of the right of property on the said 29th day of January, A. D. 1929, and relying on the said agreement did go to the said City of Belvidere, Illinois; that the said W. F. Hawthorn did inform your petitioner that he, the said H. A. Brooks, and the said Willard F. Hawthorn, had agreed upon a continuance of the said trial of the right of property, and of the agreement aforesaid, and that relying thereon, and because of said agreement, the said August Degner, your petitioner, did not attend said trial or make any effort to present his case at the trial of the right of property aforesaid; that on, to-wit: the 29th day of January, A.D. 1929, at to-wit: The City of Dixon, Illinois, the said Charles Jeanblanc, without the knowledge of your petitioner, his attorney, or the said H. A. Brooks, did employ the firm of Keller, Dixon and Gehant, attorneys to represent him in

there agreed to a continuance of the trial of the right of
property aforesaid until a future date for trial, and agreed to
inform their respective clients thereof, and that the date for
the trial of said cases would be carried over to the said date;
that the reason for the agreement for the said continuance was
afore said was that the said H. A. Brooks was engaged for a trial
in Chicago, Illinois, on a claim before the arbitrator in a
cause pending before the Industrial Commission, on the said
January 22, 1928, at the hour the said trial of the right of
property was to be held; that the said W. T. Westborn, attorney,
as aforesaid, was engaged for a trial in the City of Belvidere,
Illinois, on the said January 22, A. D. 1928, at the hour the
said trial of the rights of property was to be held; that the
said H. A. Brooks did, in pursuance of said understanding and
agreement, refrain from prosecuting the said trial of the right
of property on the said 23rd day of January, A. D. 1928, and did
attend and take part in the said hearing before said arbitrator
at Freeport, Illinois on said date; that the said W. T. Westborn
did in pursuance of said understanding and agreement, refrain from
defending at the said trial of the right of property on the said
23rd day of January, A. D. 1928, and relying on the said agree-
ment did go to the said City of Belvidere, Illinois; that the
said W. T. Westborn did inform your petition that he, the
said H. A. Brooks, and the said William T. Westborn, had agreed
upon a continuance of the said trial of the right of property,
and of the agreement aforesaid, and that relying thereon, and
because of said agreement, the said James L. Jones, your petitioner,
did not attend said trial or make any effort to present his case
at the trial of the right of property aforesaid; that on, to-wit:
the 23rd day of January, A. D. 1928, at to-wit: The City of Freeport,
Illinois, the said Charles L. Jones, without the knowledge of your
petitioner, his attorney, or the said H. A. Brooks, did employ the
firm of Keller, Dixon and Gibson, attorneys to represent him in

the matter of the trial of the right of property, and that without the knowledge of the said petitioner, his attorney, or the said H. A. Brooks, the said Charles Jeanblanc, did procure the said firm and they did prosecute for said Charles Jeanblanc the said trial of the right of property, and obtained the judgment against your petitioner aforesaid, in the absence and without the knowledge of your petitioner, his attorney, and of the said H. A. Brooks, he, the said Charles Jeanblanc not having informed the said firm or any of its members that he had employed the said H. A. Brooks in said matter, and that on the 31st day of January, 1929, said Charles Jeanblanc caused an execution to be issued out of the said Justice's Court in the sum of \$73.25 as aforesaid.

It is insisted, in opposition to the contention of appellant, that the appellant and his attorney were guilty of negligence and for that reason appellant is not in any position to ask for the relief sought as prayed for in his petition. The petition clearly sets forth the fact that there was an agreement entered into by the attorneys of the respective parties to this cause. If, as is stated in the petition, there was an agreement that the cause should stand continued and be set for hearing at some other date to be agreed upon by the attorneys for the respective parties, then the appellant, Degner, had a right to rely upon such agreement and he states in his petition that he did rely upon the agreement and for that reason he did not appear before the justice of the peace on the day that the cause had been set for hearing, on January 29th, 1929.

It is also shown by the petition that after the agreement was entered into for a continuance, appellee Jeanblanc, hired another firm of lawyers to try the case for him; that he did not inform the firm of attorneys employed that previously H.A.Brooks had represented him as his attorney in the cause. Appellee Jeanblanc evidently had notice of the agreement for a continuance of the case entered into by his attorney H. A. Brooks. The proof of

the matter of the trial of the right of property, and that without the knowledge of the said petitioner, the attorney, or the said N. A. Brooks, the said Charles Leachman, did procure the said trial and they did prosecute for said Charles Leachman the said trial of the right of property, and obtained the judgment against your petitioner aforesaid, in the chance and without the knowledge of your petitioner, the attorney, and of the said N. A. Brooks, he, the said Charles Leachman not having informed the said N. A. Brooks in any of its members that he had employed the said N. A. Brooks in said matter, and that on the first day of January, 1899, said Charles Leachman caused an execution to be taken out of the said Justice's Court in the sum of \$75.00 as aforesaid.

It is further, in opposition to the contention of your client, that the appellant and his attorney were guilty of negligence and for that reason appellant is not in any position to ask for the relief sought as prayed for in his petition. The petition expressly sets forth the fact that there was an agreement entered into by the attorneys of the respective parties to this cause. It is stated in the petition, there was an agreement that the case should stand continued and be set for hearing at some other date to be agreed upon by the attorneys for the respective parties, then the appellant, Deann, had a right to rely upon such agreement and he stated in his petition that he did rely upon the agreement and for that reason he did not appear before the Justice of the Peace on the day that the case had been set for hearing, on January 25th, 1899.

It is also shown by the petition that after the agreement was entered into for a continuance, Charles Leachman, stated another firm of lawyers to try the case for him; that he did not inform the firm of attorneys employed that previously N. A. Brooks had represented him as his attorney in the matter. Charles Leachman evidently had notice of the agreement for a continuance of the case entered into by his attorney N. A. Brooks. The trial of

this is the fact that he hired other attorneys to represent him. Good faith and fair dealing required him, after knowledge of the agreement for a continuance, to inform appellant that he intended hiring other attorneys to try the case on January 29th, 1929.

Beam et al v. Denham, et al, reported in 2 Scammon, 58, was a bill in Chancery praying for an injunction and for a new trial. It appears that a suit on a ~~xxx~~ replevin bond had been instituted in the Circuit Court of Madison County; that shortly before the term of court to which the writ in the action on the replevin bond was returnable, one of the principals on the bond became ill and unable to attend the court; that he sent an agent to court to attend to his suit; that the said agent called upon the attorney for the plaintiff in the suit on the replevin bond, who informed said agent, in view of the circumstances of the case, that said suit should be continued; that notwithstanding said agreement to continue the case the plaintiff proceeded to take a judgment by default. The court in its decision at page 60, among other things said: "The allegations in the bill that the complainants neglected to make a defense in consequence of the promise of the attorney in the suit to continue the cause on the replevin bond would, if true, be sufficient ground for a court of equity to grant relief. The complainants, upon the assurance that the cause should be continued, were justified in not being prepared for trial. The default was consequently against good faith and deprived them of their legal rights to have a trial on the merits."

The character of agreement for a continuance as was had by the attorneys representing appellant and appellee is quite general among lawyers. Circumstances frequently arise when attorneys engaged in a general practice of the law are not prepared to enter upon a trial and are obliged to have the case reset. That is what was done in this case. It appears to have been done in good faith. Appellant relying upon the agreement did not

This is the fact that he hired other attorneys to represent him. Good faith and fair dealing required him, after knowledge of the agreement for a continuance, to inform himself that he intended hiring other attorneys to try the case on January 22nd, 1937. Beam et al v. Denton, et al, reported in 2 Southern, 88, was a bill in Chancery praying for an injunction and for a new trial. It appears that a writ on a new trial was granted and Beam instituted in the Circuit Court of Madison County, and shortly before the term of court to which the writ in the action on the new trial was returnable, one of the principals on the bond became ill and unable to attend the court; that he sent his agent to court to attend to his suit; that the said agent called upon the attorney for the plaintiff in the suit on the new trial bond, who informed said agent, in view of the circumstances of the case, that said suit should be continued; that notwithstanding said agreement to continue the case the plaintiff proceeded to enter judgment by default. The court in its decision of page 80, among other things said: "The allegations in the bill that the complainants neglected to make a defense in consequence of the illness of the attorney in the suit to continue the case on the new trial bond would, if true, be sufficient ground for a writ of relief to grant relief. The complainants, upon the answer, that the cause should be continued, were justified in not being awarded for trial. The default was consequently a nullity and the complainants were deprived then of their legal rights to have a trial on the merits. The character of agreement for a continuance as was held by the attorneys representing complainant and as it is stated in general among lawyers. Circumstances frequently arise when attorneys engaged in a general practice of the law are not required to enter upon a trial and are obliged to give the case up. That is what was done in this case. It appears to have been done in good faith. Excellent relief upon the agreement is not

appear for trial; he had no knowledge of the judgment until after the day it was rendered; he could not comply with the statutory provision of giving notice for an appeal.

The effect of the motion to quash the writ was in the nature of a demurrer to the petition and admitted all of the facts well pleaded. We think there were sufficient facts set up in the petition to authorize the appellant to have a trial upon the merits of the case.

The order of the Circuit Court of Lee County will therefore be reversed and the cause remanded for a new trial.

Reversed and remanded.

appear for trial; he had no knowledge of the judgment until after the day it was rendered; he could not comply with the statutory

provision of giving notice for an appeal.

The effect of the motion to set aside the writ was the nature of a demurrer to the petition and admitted all of the facts well pleaded. He thinks there were sufficient facts set up in the petition to authorize the appeal and that a trial upon the merits of the case.

The order of the Circuit Court of New Jersey will therefore be reversed and the case remanded for a new trial.

Reversed and remanded.

STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I, JUSTUS L. JOHNSON. Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause. of record in my office.

In Testimony Whereof. I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa. this_____day of _____in the year of our Lord one thousand nine hundred and thirty-_____

Clerk of the Appellate Court

AT A TERM OF THE APPELLATE COURT.

Begun and held at Ottawa, on Tuesday, the second day of February, in the year of our Lord one thousand nine hundred and thirty-two, within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.

Hon. FRED G. WOLFE, Justice.

Hon. JAMES S. BALDWIN, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

265 I.A. 616⁴

BE IT REMEMBERED, that afterwards, to-wit: On

MAR 15 1932 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Esther Robson Parrish,
(Complainant)
Plaintiff in error

vs.

Herman Parrish
(Defendant)
Defendant in error

Bill for Divorce
Writ of Error to the
Circuit Court of
Stark County

—
Herman Parrish
(Cross Complainant)
Defendant in error

vs.

Esther Robson Parrish
(Cross Defendant)
Plaintiff in error

Cross Bill for
Divorce

JETT, P.J.

The record discloses that Esther Robson Parrish filed a bill for divorce in the circuit court of Stark County, charging Herman Parrish, her husband, with extreme and repeated cruelty. Herman Parrish filed an answer and also a cross bill in which he charged Esther Robson Parrish with extreme and repeated cruelty and prayed for a divorce in his said cross bill from the said Esther Robson Parrish.

After issue was joined the cause was referred to a special master to take and report the testimony. The special master took the testimony as directed and reported the same to the Chancellor. The Chancellor heard the cause and dismissed the original bill filed by Esther Robson Parrish and entered a decree granting to Herman Parrish a divorce on the ground of extreme and repeated cruelty. It is from the action of the Chancellor in dismissing the original bill and in granting a decree as prayed for in the cross-bill that the plaintiff in error prosecutes this writ of error.

The only issue before the court is whether or not there is sufficient evidence to support the decree entered by the

Ester Rosen Parish,
(Defendant)

Plaintiff in error

vs.

Herzen Parish
(Defendant)

Defendant in error

Bill for divorce
This is a bill for the
divorce of the
above named parties

Herzen Parish
(Cross Defendant)

Defendant in error

vs.

Ester Rosen Parish
(Cross Defendant)

Plaintiff in error

Bill for
divorce

LET, P. 1.

The record discloses that Esther Rosen Parish filed a bill for divorce in the circuit court of Henry County, Georgia, against Herzen Parish, her husband, with extreme and repeated cruelty. Herzen Parish filed in answer and filed a cross bill to which he charged Esther Rosen Parish with extreme and repeated cruelty and prayed for a divorce in his said cross bill from the said Esther Rosen Parish.

After issue was joined the cause was brought to a hearing matter to take and report the testimony. The parties who took the testimony as directed and reported the same to the Chancellor. The Chancellor heard the cause and rendered the original bill filed by Esther Rosen Parish and entered a decree granting to Herzen Parish a divorce on the ground of extreme and repeated cruelty. It is from the entry of the Chancellor in dismissing the original bill and in granting a decree as prayed for in the cross-bill that the plaintiff in error prosecuted this writ of error.

The only issue before the court is whether or not there is sufficient evidence to support the decree entered by the

Chancellor in the dismissing of the original bill for want of equity, and granting a divorce on the cross-bill for extreme and repeated cruelty as charged therein.

The original bill filed by the plaintiff in error, Esther Robson Parrish, charges Herman Parrish, defendant in error, with several acts of extreme and repeated cruelty. The evidence on the part of the plaintiff in error is confined almost wholly to her testimony. The record discloses that there is some evidence of witnesses as to what the plaintiff in error told them; that she showed them a bruise that she had on her shin. Other than her own testimony there is substantially nothing in the record that is competent to be considered to support her contention. A motion was made before the special master by defendant in error to strike the testimony as to what she stated to certain witnesses, on the ground that it was hearsay evidence.

The defendant in error denied the charges as preferred against him by the plaintiff in error in her original bill. In addition to the denying of the charges by the defendant in error a number of witnesses testified that the general reputation of the plaintiff in error for truth and veracity in the vicinity in which she resided was bad. No witnesses were called by the plaintiff in error to sustain her reputation for truth and veracity.

Herman Parrish, defendant in error, testified to a number of acts of cruelty on the part of Esther Robson Parrish, plaintiff in error. The defendant in error is corroborated relative to the charges as set forth in his cross-bill of a number of acts of cruelty towards him by the plaintiff in error. If the acts of the alleged cruelty as testified to by the plaintiff in error were true, then it would necessarily follow that she would be entitled to a decree for divorce. In order for her to be entitled to a divorce it was incumbent upon her to establish by a greater weight of the testimony the truthfulness of her allegations. Before a decree could be granted for extreme and repeated cruelty she would necessarily have to be corroborated as to the acts of cruelty upon

of counsel in the disclosure of the original bill for want of equity, and granting a divorce on the ground of the original and repeated cruelty as charged therein.

The original bill filed by the plaintiff in error, charges

Robert Parrish, charged Robert Parrish, defendant in error,

with several acts of extreme and repeated cruelty. The witness

on the part of the plaintiff in error is convinced almost wholly to

her testimony. The record discloses that where it was stated

of Parrish as to what the plaintiff in error told her; that

she stated that a divorce that she had on her mind. After that

her own testimony there is substantially nothing in the record

that is consistent to be considered to support her contention. A

action was made before the special master by defendant in error to

strike the testimony as to what was stated to certain witnesses,

on the ground that it was hearsay evidence.

The defendant in error denied the charges as contained

against him by the plaintiff in error in her original bill. In

addition to the denying of the charges by the defendant in error

a number of witnesses testified that the general reputation of the

plaintiff in error for truth and veracity in the vicinity in which

she resided was good. No witnesses were called by the plaintiff

in error to sustain her reputation for truth and veracity.

Robert Parrish, defendant in error, testified that

of acts of cruelty on the part of Robert Parrish, defendant

in error. The defendant in error is corroborated by the

charges as set forth in his cross-bill of a number of acts of

cruelty towards him by the plaintiff in error. In the bill of the

plaintiff in error it is testified to by the plaintiff in error that

thus, then it would necessarily follow that the bill of the

to a decree for divorce. In order for her to be entitled to a

divorce it was incumbent upon her to establish by a preponderance

of the testimony that truthfulness of her allegations. Where a

decree could be granted for extreme and repeated cruelty as charged

necessarily have to be corroborated as to the acts of cruelty upon

which she relied. It appears that the plaintiff in error was endeavoring to obtain facts to sustain her in the bill that she subsequently filed praying for a divorce from the defendant in error. The record discloses that she kept a diary of what she termed "fights with her husband", during the time she lived with him. It appears to have been her habit, more or less, to call the neighbors on the telephone and tell them to listen in at a certain time and they would hear something. At these times she would leave the receiver down and pretend to be fighting, accusing her husband of having a butcher-knife, an axe or a maul and she would be begging him and imploring him not to strike her.

If the allegations of the cross-bill are true the defendant in error was entitled to a decree for divorce. The defendant in error denied the alleged acts of cruelty charged to him by the plaintiff in error and as we have already stated she has not been corroborated in her charges. The defendant in error testified to a number of acts of cruelty and is corroborated. It would serve no good purpose to set out the testimony and because of the character of a part of the testimony, as to language the plaintiff in error used toward the defendant in error, we do not care to quote it herein.

In our opinion, in view of the state of the record the Chancellor was clearly within the rule in granting the decree on the cross-bill. There is evidence in the record tending to show that the plaintiff in error was improperly endeavoring by the use of the telephone to obtain testimony in advance of the filing of the bill for divorce; that her standing in the vicinity relative to her reputation for truth and veracity was bad.

We conclude, therefore, that the Chancellor did not err in granting the decree. The decree is affirmed.

Decree Affirmed.

which was relied. It appears that the plaintiff is now in
possession to obtain facts to establish her in the bill and
subsequently filed praying for a witness from the defendant in
error. The record discloses that on April 2, 1934, the
record "finds with her husband", finding that the bill was
him. It appears to have been her habit, when on leave, to call
the neighbors on the telephone and tell them to listen in at a
certain time and they would hear something. At some time she
would leave the receiver open and pretend to be listening, and she
has a record of leaving a battery-charge, on one or more days, and she
would be leaving the same and imitating her as she is doing now.
It is the allegations of the case - all in the bill and the
in error was entitled to a decree for divorce. The defendant
in error denied the alleged acts of cruelty charged in the bill
the plaintiff in error and as we have already stated, the bill
not been corroborated in her charges. The defendant in error
testified to a number of acts of cruelty and in consequence
it would serve no good purpose to set out the testimony and findings
of the matter of a part of the testimony, as to the bill and
plaintiff in error used to set out the defendant in error, as it is not
one to state it herself.
In my opinion, in view of the state of the record, the
defendant was clearly within the rule in granting the divorce
on the grounds. There is evidence in the record tending to
show that the plaintiff in error was improperly influenced by the
use of the evidence to obtain testimony in evidence of her husband
of the bill for divorce; that her husband in the vicinity
relative to her testimony for the bill and vicinity was not.
We conclude, therefore, that the defendant in error is
in granting the decree. The decree is affirmed.
Lester R. Brown.

STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and thirty-_____

Clerk of the Appellate Court

75 7
AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the second day of February, in
the year of our Lord one thousand nine hundred and thirty-two,
within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.

Hon. FRED G. WOLFE, Justice.

Hon. JAMES S. BALDWIN, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

265 I.A. 616⁵

BE IT REMEMBERED, that afterwards, to-wit: On

MAR 15 1932 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

October Term, A. D. 1931

Lee Wadleigh,

Appellee,

vs.

Appeal from the Circuit Court of

John Karcher,

Iroquois County

Appellant.

WOLFE, J:

The appellee started his action in assumpsit in the Circuit Court of Iroquois County which was tried before a jury upon the issues made by the pleadings set forth herein. The declaration consisted of the common counts accompanied by the affidavit of the plaintiff's attorney that the demand was for money lent at defendant's request; that the plaintiff loaned the defendant \$1500.00 on June 1, 1925, and a further sum of \$3,000.00 on June 29, 1925. That after allowing all just credits, etc., there is now due and owing the plaintiff the sum of \$5,248.33.

The defendant pleaded the general issue and filed a claim of set-off, for money being due as a balance on account for goods sold and delivered to the plaintiff, and money paid out at the plaintiff's request. The defendant filed an affidavit of merits with the plea and averred that it was the defendant's belief that he had a good defense on the merits to plaintiff's entire demand; that the plaintiff never loaned him any sum at any time; that he was not indebted to the plaintiff for money borrowed, or otherwise, but, after allowing all just credits, deductions and set-offs, the plaintiff owed the defendant the sum of \$3,138.04, being the balance on account of goods sold and money paid out at plaintiff's request. To the defendant's plea of set-off the plaintiff filed a similiter and issue was

IN THE
SUPREME COURT OF THE STATE OF NEW YORK
IN SENATE

October Term, A. D. 1921

Lee Adolph,

Appellee,

vs.

Appellant from the District Court of

Tioga County

John Langer,

Appellant.

WOLF, J.

The appellee started his action in senatus in the District Court of Tioga County which was tried before a jury upon the issues made by the pleadings set forth herein. The declaration consisted of the common counts accompanied by the affidavit of the plaintiff's attorney that the demand was for money lent at defendant's request; that the plaintiff loaned the defendant \$2500.00 on June 1, 1920, and a further sum of \$2,000.00 on June 9, 1920. That after allowing all just credits, etc., there is now due and owing the plaintiff the sum of \$2,248.32.

The defendant pleaded the general issue and filed a claim of set-off, for money being due as a balance on account for goods sold and delivered to the plaintiff, and money paid out by the plaintiff's request. The defendant filed an affidavit of assets with the plea and averred that it was the defendant's belief that he had a good defense on the merits to plaintiff's action; that the plaintiff never loaned him any sum of money; that he was not indebted to the plaintiff for money borrowed, or otherwise; and, after allowing all just credits, deductions and set-offs, the plaintiff owed the defendant the sum of \$3,100.00, being the balance on account of goods sold and money paid out at plaintiff's request. To the latter defendant's plea of set-off the plaintiff filed a similar and issue was

joined. The jury found the issues in favor of the plaintiff and assessed his damage at \$3,000.00. Judgment was entered on the same, which was properly excepted to by the defendant, and he brings the case to this court for review.

The plaintiff testified that he was a farmer living at Herscher in Kankakee County, and that he and the defendant had been friends for years; that the defendant was a grain-dealer; that on June 1, 1925 he had a deal with the defendant on the Board of Trade and gave him \$1500.00 to buy 30,000 bushels of September corn, the defendant to handle the deal through his commission men in Chicago. The plaintiff further testified that on June 29, 1925 the defendant came to his home and asked to borrow \$3,000.00, and stated that he needed that sum to pay for some grain; that he, the plaintiff, went to defendant's place of business that same afternoon and gave him a check for \$3,000. This check was introduced in evidence, and shows that it was endorsed by the defendant. He further stated in his testimony that no receipt, or note was given or requested, and no time fixed for the payment of the \$3,000.00. That he requested the repayment of this sum in September or October, 1925, and that the defendant refused and persisted in his refusal to pay, claiming that the money went to pay the loss on the Board of Trade deal. He testified that one of his sons heard the conversation on June 29. Plaintiff's two sons testified in behalf of their father, and in a great many respects corroborated his testimony.

The defendant testified that he was in the grain, coal and seed business in the town of Herscher and had known the plaintiff for twenty years or more; that he bought grain from him and sold him coal and seed. That in May 1925 the plaintiff asked him whether he could handle a trade in corn on the Board of Trade: that the defendant answered that he could through his Chicago broker. That on June 1st, 1925 as he was going to his office late one morning, the plaintiff came up to him and handed him a check for \$1500.00, and told him to buy 30,000 bushels of corn for the September opening market. That the defendant went to the telephone and called his commission house in Chicago and gave him an

joined. The jury found the issues in favor of the plaintiff and assessed his damage at \$5,000.00. Defendant was awarded on the same, which was properly executed to by the defendant, and he brings the case to this court for review.

The plaintiff testified that he was a farmer living at Benton in Kansas County, and that he and the defendant had been friends for years; that the defendant was a grain-dealer; that on June 1, 1925 he had a deal with the defendant on the Board of Trade and gave him \$1500.00 to buy 30,000 bushels of September corn, the defendant to handle the deal through his commission men in Chicago. The plaintiff further testified that on June 27, 1925 the defendant came to his home and asked to borrow \$5,000.00, and stated that he needed the sum to pay for more grain; that he, the plaintiff, went to defendant's place of business that same afternoon and gave him a check for \$5,000. This check was introduced in evidence, and shown that it was endorsed by the defendant. He further stated in his testimony that on receipt of the note was given or retained, and no time fixed for the payment of the \$5,000.00. That he requested the repayment of this sum in September or October, 1925, and that the defendant refused and defaulted in his refusal to pay, claiming that the money went to pay the loss on the Board of Trade deal. He testified that one of his sons heard the conversation on June 27. Plaintiff's two sons testified in behalf of their father, and in a great many respects corroborated his testimony. The defendant testified that he was in the grain, coal and feed business in the town of Eureka and had known the plaintiff for twenty years or more; that he bought grain from him and sold him coal and feed. That in May 1925 the plaintiff asked him whether he could handle a trade in corn on the Board of Trade; that the defendant agreed that he could through his Chicago broker. That on June 1st, 1925 he gave him his office late one morning, the plaintiff came on to the Board of Trade and gave him a check for \$1500.00, and told him to buy 30,000 bushels of corn for the September opening; that the defendant came to the telephone and called his commission men in Chicago and gave him an

order before the market opened and advised them that the order was for the plaintiff; that he received a confirmation showing that the order had been fulfilled at the price of \$1.18 per bushel, and that he showed this confirmation to the plaintiff. The market price of corn dropped, and in June regained the price of \$1.17 per bushel, but later dropped to less than \$1.00. The defendant further testified that on June 27th, 1925, the defendant called at the plaintiff's home and told him the situation relative to the market and asked for more money to cover the drop in price. That the plaintiff promised him \$3,000.00 which he paid to the defendant by check on the following Monday. That on June 1st, the plaintiff instructed the defendant to sell the corn if it reached \$1.20 per bushel, and that at another time he had instructed him to sell if he could do so at a loss of only \$1500.00. That at another time, the defendant asked the plaintiff for instructions as to what to do in regard to the sale of the corn, and the plaintiff answered "he would be fair in the matter." On the 21st of August, delivery being due on the next day, he, Wadleigh, told the defendant to sell the corn, which the defendant did at a price of 92 3/8 cents per bushel. The net loss on the deal, after commissions, etc., were paid, was \$7765.28, which he paid to the commission house. The defendant testified that after all just credits, etc., were allowed the plaintiff there was due from the plaintiff to the defendant on account of this transaction and the purchase price of coal and other commodities by the plaintiff from the defendant, the sum of \$3,138.04.

The defendant introduced the evidence of the Chicago Commission man to show that the corn was actually bought on the Board of Trade through his commission house on the account of Lee Wadleigh, and the books of the company showed that it was carried on "account of Lee Wadleigh" to distinguish it from the regular transactions of the defendant; that when the price of corn fell, the loss was charged to the defendant Karcher, and also showed the price that the deal was finally closed out on August 31st.

order before the market opened and advised the defendant that the order was for the plaintiff; that he received a confirmation to the effect that the order had been filled at the rate of 11.15 per bushel, and that he showed this confirmation to the plaintiff. The market went up to 11.17 per bushel, and in time regained the rate of 11.17 per bushel, but later dropped to less than 11.15. The defendant further testified that on June 27th, 1932, the defendant called at the plaintiff's home and told him the situation relative to the market and asked for some money to cover the drop in price. That the plaintiff provided him \$3,000.00 which he paid to the defendant by check on the following day. That on July 1st, the plaintiff instructed the defendant to sell the corn if it reached 11.25 per bushel, and that at another time he had instructed him to sell it if he could do so at a price of only 11.00.00. That at another time, the defendant asked the plaintiff for instructions as to what to do in regard to the sale of the corn, and the plaintiff answered "he would be fair in the market." On the 8th of August, delivery was made on the next day, but the plaintiff told the defendant to sell the corn, and the defendant did so at a price of 11 5/8 cents per bushel. The day 1 and 2 of the deal, after commission, etc., were paid, was \$713.75, which he paid to the commission house. The defendant testified that after all this credit, etc., were allowed the plaintiff there was due from the plaintiff to the defendant on account of this transaction and the purchase price of corn and other commodities by the plaintiff from the defendant, the sum of \$3,180.00.

The defendant instructed the witness at the Chicago Commission Bank to show that the corn was actually bought on the 8th of August, through his commission house on the account of the plaintiff, and the books of the company showed that it was bought on account of the plaintiff. He testified that from the regular transaction at the defendant's; that when the price of corn fell, he took the money to the defendant's broker, and also showed the price that the deal was finally closed out on August 8th.

The defendant called Clyde Easton, a banker at Herscher, of which bank the defendant had been a customer for many years. He testified that the defendant always maintained a balance at their bank, and had never asked the bank for credit. The defendant offered testimony that this was a bona fide deal for 30,000 bushels of corn, and that it was not a gambling transaction as far as he was concerned. The rebuttal of the plaintiff was a general denial of the defendant's testimony.

It is first insisted by the appellants that this verdict should be set aside for the reason that the verdict is contrary to the manifest weight of the evidence. The jury that tried the case and the trial court all heard the witnesses testify and they are in a better position than a court of review to pass upon the credibility of the witnesses. The jury by their verdict have found the issues in favor of the plaintiff, and this court would not be justified in setting aside their findings if they have been properly instructed relative to the law in the case.

Objection is made to the first instruction given by the court at the request of the plaintiff, which is as follows: "The court instructs you that the defendant, John Karcher, by his fourth plea, admits that he, said John Karcher, is indebted to the plaintiff, Lee Wadleigh, in the sum of \$3000.00 but alleges that the plaintiff, Lee Wadleigh, is indebted to him, the defendant, John Karcher, in a sum of money in excess of the said sum of \$3000.00." "And the Court further instructs you that the burden of proof under said fourth plea is upon the defendant, John Karcher, to prove by a preponderance of the evidence that the plaintiff, Lee Wadleigh, is indebted to the said defendant, John Karcher, over and above the said sum of \$3000.00 before you will be justified in finding a verdict for any sum of money whatsoever in favor of the said defendant, John Karcher, and against the plaintiff, Lee Wadleigh." This form of instruction has been repeatedly condemned by our courts. It will be borne in mind that the defendant filed a plea of the general issue which placed the burden

The defendant called John Karner, a witness at the trial, who testified that the defendant had been a co-owner for many years. The defendant offered testimony that this was a bona fide sale for \$5,000.00 of corn, and that it was not a gambling transaction as far as he was concerned. The result of the plaintiff was a general denial of the defendant's testimony.

It is first insisted by the defendant that this verdict should be set aside for the reason that the verdict is contrary to the best view of the evidence. The jury that tried the case and the trial court all heard the witness testify and they are in a better position than a court of review to pass upon the credibility of the witnesses. The jury by their verdict have found the issues in favor of the plaintiff, and this court would not be justified in setting aside their findings if they have been properly instructed relative to the law in the case.

Objection is made to the first instruction given by the court at the request of the plaintiff, which is as follows: "The court instructs you that the defendant, John Karner, by his fourth plea, admits that he, said John Karner, is indebted to the plaintiff, Lee Adolph, in the sum of \$5000.00. It is also stated that the plaintiff, Lee Adolph, is indebted to him, the defendant, John Karner, in a sum of money in excess of the said sum of \$5000.00." And the court further instructs you that the burden of proof is on the plaintiff. It is upon the defendant, John Karner, to prove by a preponderance of the evidence that the plaintiff, Lee Adolph, is indebted to the said defendant, John Karner, over and above the said sum of \$5000.00. Before you will be justified in finding a verdict for any sum of money, whatever in favor of the said defendant, John Karner, you must find the plaintiff, Lee Adolph, to be indebted to him. This is the instruction given to the jury, condensed by the court. It will be found in many of the defendant filed a plea of the general issue which placed a burden

on the plaintiff of proving his entire case, and this instruction would tend to mislead the jury relative to the issues they have to try; it has a tendency to inform the jury that they can use the facts set forth in the special plea as evidence of what the plea of general issue denies. In the case of *Barker vs. Barth*, 88 Ill. App. P. 28, the court in passing upon a similar instruction used the following language: "This position cannot be maintained. The general issue and special pleas of set-off were pleaded to the whole declaration, and the decision of the issues made to such pleas could be determined only by the evidence. Under our system of pleading, the defendant may plead as many pleas as he deems necessary for his defense, however inconsistent they may be, and an admission made by any one plea, cannot be used against him on an issue made by another plea. For instance, if the defendant pleads the general issue and a special plea in confession and avoidance, the latter plea necessarily admits that the plaintiff has prima facie a cause of action; but the plaintiff cannot use this admission as evidence, and must prove his case on the issue made by the plea of the general issue, as if there were no special plea."

This same rule has been followed by this Court in *McPherson vs. Board of Education* 235 App. page 429, and in *Bradley vs. Automobile Insurance Exchange* 227 Ill. Page 576, and numerous other authorities have been cited holding to the same effect.

The second instruction given on behalf of the plaintiff to the jury is also criticised by appellant. This form of instruction has been repeatedly criticised by our Supreme Court and Appellate Courts as singling out certain facts and giving undue emphasis to what the jury should consider in making up their verdict. In passing upon a similar instruction, our Supreme Court in *Evans vs. Dickie*, 117 Ill. at page 293, have this to say: "The giving of the sixth instruction for plaintiff, as was done, was also error. It was faulty for several reasons. It is a mere summary of the principal facts, as plaintiff insisted they were, and the conclusion to be drawn from such facts, stated by the court as a matter of law. That

on the plaintiff of proving his entire case, and that the plaintiff would tend to mislead the jury relative to the issues they have to try; it was a tendency to follow the jury that they can see the facts set forth in the material place in evidence of what the plea of general issue and special plea of assault were intended to the whole declaration, and the decision of the issues made to each plea could be determined only by the evidence. Under our system of pleading, the defendant may plead as many pleas as he deems necessary for his defense, however inconsistent they may be, and an admission made by any one plea, cannot be used against him in an issue made by another plea. For instance, if the defendant pleads the general issue and a special plea in confession and avoidance, the latter plea necessarily admits that the plaintiff has shown facts a cause of action; but the plaintiff cannot use this as evidence, and must prove his case in the issue made by the plea of the general issue, as if there were no special plea. This same rule has been followed by this Court in *Bohannon v. Board of Education* 235 App. 2d 445, and in *Washley v. United Mobile Telephone Exchange* 237 Ill. 2d 775, and numerous other authorities have been cited holding to the same effect. The second instruction given on behalf of the plaintiff to the jury is also criticized by appellant. This type of instruction has been repeatedly criticized by our Supreme Court and Appellate Courts as singling out certain facts and giving undue emphasis to what the jury should consider in making up their verdict. It is especially objectionable in instructions for cases where the facts are mixed, as in *Bohannon v. Board of Education*, 235 App. 2d 445, and in the sixth instruction for plaintiff, as was done, was also error. It was faulty for several reasons. It is a mere summary of the material facts, as plaintiff insisted they were, and the conclusion to be drawn from such facts, stated by the court as a matter of law. That

mode of instructing is little less than the decision of the whole case by the court, and the practical effect is to withdraw the case from the jury. It might as well have been withdrawn from the jury in terms, so far as anything was left for their decision. But a more serious objection appears on a close reading of the instruction. It is seen it assumes as facts, matters that are and were the subject of a serious contention between the parties. This is not allowable, and is a most hurtful mode of instructing the jury. Aside from this, another most serious error exists in this instruction. It excludes from the consideration of the jury, by its summary of alleged facts, the defense insisted upon, which certainly has some testimony in its support." We think that the trial court erred in giving this instruction. Vaughn vs. General Director of Railroads, 218 app. page 575.

The 3rd and 4th instructions given on behalf of the plaintiff are criticised by the appellant, but we do not believe that these instructions are subject to the criticism that the appellant makes. The court refused to instruct the jury as requested by the defendant on the purchase of commodities for future delivery. We see no reason why this instruction should not have been given in view of the fact that the court gave the plaintiff's instruction No. 4. In this case there was a sharp conflict relative to the nature of this transaction, and the evidence is so nearly equally balanced that the instruction should be accurate. It is our opinion that on account of the giving of the first and second instructions for the plaintiff that this judgment should be reversed and the cause remanded to the Circuit Court of Iroquois County, which is accordingly done.

Reversed and Remanded.

mode of instruction is little less than the failure of the trial
case by the court, and the practical effect is to withdraw the case
from the jury. It must be well known to every lawyer that the
in terms, so far as anything was left for the jury to decide, and a
serious suggestion appears on a close reading of the instruction. It
is seen it assumes as facts, matters that were the subject of
a serious contention between the parties. There is not a shadow, and
is a most useful mode of instructing the jury. It is true that
another most serious error exists in this instruction. It excludes
from the consideration of the jury, the opportunity of altered facts,
the defense insisted upon, which certainly was not testimony in the
support. We think that the trial court erred in giving this in-
struction. Vaughn vs. General Director of Railroads, 218 Ill. 400, 95
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criticized by the appellant, but we do not believe that these instructions
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purchase of commodities for future delivery. We see no reason why
this instruction should not have been given in view of the fact that
the court gave the plaintiff's instruction No. 4. In this case
there was a sharp conflict relative to the nature of this transaction,
and the evidence is so nearly equally balanced that the instruction
should be accurate. It is our opinion that in no event of the giving
of the first and second instructions for the plaintiff that the
judgment should be reversed and the cause remanded to the District
Court of Lincoln County, which is accordingly done.

Reversed and remanded.

STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and thirty-_____

Clerk of the Appellate Court

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the second day of February, in
the year of our Lord one thousand nine hundred and thirty-two,
within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.

Hon. FRED G. WOLFE, Justice.

Hon. JAMES S. BALDWIN, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

265 I.A. 617¹

BE IT REMEMBERED, that afterwards, to-wit: On

MAR 15 1932

the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

IN THE CIRCUIT COURT OF THE STATE OF ILLINOIS

WILLIAM W. WATKINS

CHICAGO, ILL., A. D. 1911

ANDREW ARCOH, Administrator

of the Estate of STEPHEN ARCOH,

Deceased,

vs. CHICAGO & NORTHWESTERN RAILWAY COMPANY,

of said County.

CHICAGO & NORTHWESTERN RAILWAY COMPANY,

a corporation,

Appellant,

vs. J. J. WATKINS,

This is an action brought in the Circuit Court of said

County by Andrew Arch, as administrator of the estate of Stephen

Arch, deceased, against the Chicago and North Western

Company to recover damages in respect of the death of Stephen

Arch caused by reason of the alleged negligence of the said

company. A jury trial was had and resulted in a verdict and judg-

ment to the amount of \$4000.00 being returned against the company,

which produces this appeal.

The appellant assigns twelve alleged errors of the trial

court as reasons for the reversal of the judgment. In view of the

conclusions we have reached in the case, we consider that only two

of these assigned should be decided by the court. It is contended

by the appellant that the trial court erred in admitting the

evidence in respect of the judgment for the reason that the decision

is not sufficient to support the judgment; It is also urged by the

appellant that the trial court erred in giving improper instructions

to the jury on request of the appellee.

The decision consists of two counts and assigns in the

first count that the appellant charged in the language of counting

praise for the conveyance of passenger cars for transportation over the

streets in the City of Joliet; that it was the duty of the appellant when so operating its buses to exercise reasonable care not to wilfully, wantonly and recklessly injure a person riding on the outside of its buses when in motion; that on August 27, 1930, at 11 o'clock P.M., Clarence Green, a servant and employee of the appellant, was managing one of appellant's buses in an easterly direction on Clinton street in said city in and through a subway under railroad tracks which were sustained by upright pillars or piers, when Stephen Aroch, then thirteen years old, was riding on the outside of appellant's said bus; that Green, knew, or by the exercise of reasonable care could have known that Stephen Aroch was riding on the outside of the bus on the north side thereof; that Green then and there recklessly, wilfully and wantonly drove and managed said bus at a rate of 20 miles per hour, at a distance of, to-wit, six inches from the upright pillars in the subway, and by reason of the close proximity of the bus when in motion to the pillars and as a direct result and in consequence of defendant's wilful and wanton conduct in the operation of the bus, said Stephen Aroch was crushed between the pillars and the bus, and was thrown from the bus to the pavement and fatally injured from the effects of which he died, etc.

The second count contains the same allegations, by way of inducement, as are in the first count, but alleges further that the subway was paved with brick to a width of 27 feet with upright pillars underneath the railroad tracks in the center of the roadway dividing the north part from the south half, to a width of 18 feet on each side of the center piers for the use of vehicles moving under said railroad tracks; that when Green was operating the bus near the subway, three boys, including Stephen Aroch, were riding, or about to ride, on the outside of the bus, and Green stopped the bus and caused the boys to leave the outside of the bus and thereafter the boys returned and got onto the bus; that Green

streets in the City of Dallas, that it was the duty of the defendant when so operating its buses to exercise reasonable care not to willfully, wantonly and recklessly injure persons riding on the outside of the buses when in motion; that on January 27, 1934, at 11 o'clock P.M., Clarence Green, a servant and employee of the appellant, was managing one of appellant's buses in an easterly direction on Clinton Street in said city in and between a subway under railroad tracks which were maintained by North Texas Electric Power Company, then Stephen Arch, then William Arch, then Arch, on the outside of appellant's said bus; that Green, Arch, or any of them, the exercise of reasonable care could have known that Arch was riding on the outside of the bus on the north side thereof; that Green then and there recklessly, willfully and knowingly drove and managed said bus at a rate of 10 miles per hour, in a dangerous manner, six inches from the sidewalk, in the street, and by reason of the above-mentioned facts the bus was in motion in the street and as a direct result and in consequence of defendant's willful and wanton conduct in the operation of the bus, said Arch was crushed between the sidewalk and the bus, and was thrown from the bus to the sidewalk and fatally injured from the effects of which he died, etc.

The second count contains the same allegations, by way of inducement, as are in the first count, but alleges further that the subway was covered with brick to a width of 10 feet with concrete pillars underneath the railroad tracks to the center of the roadway dividing the north and south halves, to a width of 10 feet on each side of the center of the street; that when Green was operating the bus under said railroad tracks; that when Green was operating the bus near the subway, three feet, including the sidewalk, was riding on about to ride, on the outside of the bus, and Green stopped the bus and caused the boys to leave the outside of the bus and thereafter the boys returned and got into the bus and drove

resumed his position in the bus and he stated in substance, 'that he would give them a headache'. And when Green knew, or in the exercise of reasonable care could have known that the boys returned to the outside of the bus and were riding thereon; that Green, with an unobstructed space of 18 feet in width on the south half of the Clinton street subway on which he operated the bus, recklessly, wilfully and wantonly operated the bus at a rate of twenty miles an hour within a distance of six inches from the center pillars of the subway, and one of the fenders on the north side of the bus scraped against the pillars, and as a direct result and in consequence of the wilful and wanton operation of the bus by Green, the decedent, who was riding on the north side of the bus was crushed between the said bus and the metal pillars of the subway, etc.

The declaration alleges that the bus driver, Green, operated the bus at a rate of twenty miles per hour within a distance of six inches from the pillars of the subway. These allegations do not recite a state of facts showing such gross want of care by Green as to indicate a wilful disregard of consequences or a willingness to inflict injury. Nor does the declaration contain any allegations that Green operated the bus in utter disregard of the safety of others, nor do any averments appear in the declaration from which the conclusion can be drawn that the bus was so operated by Green. The facts alleged in the declaration do not justify the presumption of wilfulness on the part of Green without his knowledge of the dangerous position of the intestate. The charge in the declaration does not bring the case within the rule laid down in the case of *Bremem v. L.E. & W. R. R. Co.*, 318 Ill. 11, that the defendant need not be aware of the position of peril of a trespasser if the negligence of the defendant is so gross as indicates a wilful disregard of consequences or a willingness to inflict injury. The facts alleged in the declaration are not such that it can be said, that the bus was being operated in wanton and wilful disregard

etc.

[illegible]

of the rights and safety of the public, of which the intestate was a part, so that Green's negligence, if any, was wilful before he was aware of the perilous position of the intestate. In other words, the appellant did not owe the intestate the duty not to drive the bus but within six inches of the pillars in that part of the street devoted to vehicular traffic, unless Green knew that the intestate was in a position of danger from collision with the pillars by being on the outside of the bus.

The allegation that Green had knowledge of the position of danger of the intestate on the outside of the bus was a material one and was to be proven by the plaintiff to make out his case. That the averment of the declaration in the alternative that Green knew, or by the exercise of reasonable care could have known that the intestate was riding on the outside of the bus, was subject to demurrer must be conceded on the ground that such an averment was not a positive allegation of knowledge. (*Mengelkamp v. Consolidated Coal Co.*, 259 Ill. 305). As a charge of negligence and a charge of wilful and wanton conduct are independent and separate and have nothing in common, it is also clear that an action charging wilful conduct cannot be based, or predicated, on an allegation of a failure to exercise reasonable care.

The appellant did not demur to the declaration, and its sufficiency to support the judgment is now being tested under the motion in arrest of the judgment made in the lower court after verdict. After verdict all intendments and presumptions are in favor of the sustaining of the declaration, and if it contains terms sufficiently general to include, by fair and reasonable intendment, any matter necessary to be proved and without which the jury could not have given the verdict, the want of such express averment of such matter is cured by verdict. *Sargent Co. v. Baublis* 215 Ill. 428. Where a demurrer is not interposed to a declaration and the sufficiency of the declaration is questioned after verdict on the ground that it does not state a cause of action, the declaration is to be liberally construed. *Smith v. Rutledge*, 332 Ill. 150;

Wilson v. St. Joseph (Mo. App.) 123 S. W. 504. In the absence of a demurrer, in determining whether or not a declaration will support the judgment where there are alternative averments, the declaration must be tested by the stronger alternative. Woodward Iron Co. v. Burges, 219 Ala. 136 - 121 So. 399.

The sufficiency of the declaration must be determined from the language of the declaration itself. O'Brien v. Chicago Ry. Co. 293 Ill. 140. We think under the rules announced, that by fair and reasonable intendment, and that knowledge was necessarily to be proved by the appellee, it appears from the declaration that the bus driver, Green, after knowledge of the presence of the intestate on the north outside of the bus, wilfully drove the bus close to the pillars and as a result of such wilful conduct of Green the intestate was crushed against one of the pillars. That, therefore, it was not essential that the declaration allege that the intestate was wilfully injured by the servant of the appellant. Harris v. Figgly Wiggly Stores, 236 Ill. App. 392; P.C.C. & St. L. Ry. V. Kinnare, 203 Ill. 588; Williams v. Kappan, 242 Ill. App. 166; Jeneary v. C. & I. Traction Co., 306 Ill. 392.

Another error assigned by the appellant is, that the court erred in giving to the jury at the request of the appellee, instruction No. 5, which is as follows: "It is a question of fact for the jury to determine from a preponderance of the evidence and under the instructions of the court, whether or not the death of Stephen Aroch was caused by the wilful and wanton negligence of the defendant's servant in operating its bus under the viaduct on Clinton street so as to cause said Stephen Aroch to be thrown from said bus." Upon examination of the evidence we find that the case is a close one, and that the instructions given to the jury should not have been subject to misinterpretation by the jury. This instruction is subject to the construction that the court assumed that the wilful negligence of the appellant was proved by the evidence and the jury should determine only the cause of the

death of the intestate. We think that the giving of this instruction in this case was reversible error and as the case must be reversed and remanded for that reason, we deem it improper to state an analysis of the evidence. We are also of the opinion that instructions to the effect that the appellant by the exercise of reasonable care could have discovered that the intestate was on the bus, should not be given in the event there is a re-trial of the case. The judgment is hereby reversed and case remanded.

Reversed and remanded.

death of the intestate. The claim that the widow of the intestate
in this case was reversible error and as the case was
reversed and remanded for that reason, no need is thought to
state an analysis of the evidence. As the issue of the widow's
that instructions to the effect that the widow was entitled to
of reasonable care could have discovered that the intestate was in
the fact, should not be given in the event found in a verdict in
the case. The judgment is hereby reversed and case remanded.
Reversed and remanded.

STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and thirty-_____

Clerk of the Appellate Court

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the second day of February, in
the year of our Lord one thousand nine hundred and thirty-two,
within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.

Hon. FRED G. WOLFE, Justice.

Hon. JAMES S. BALDWIN, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

265 I.A. 617²

BE IT REMEMBERED, that afterwards, to-wit: On

MAR 1 8 1932 the opinion of the Court was filed in the

Clerk's office of said Court, in the words and figures
following, to-wit:

In the Appellate Court of Illinois

Second District

October Term, A. D. 1931

Thomas J. O'Meara, Administrator
of the Estate of Charles L. Elward,
Deceased,

Appellant

vs.

Appeal from the Circuit
Court of La Salle
County, Illinois

The Chicago, Rock Island & Pacific
Railway Company, a corporation,
Appellee

Wolfe, J:

The defendant railway company has a double track railroad running through the City of La Salle, Illinois, in an easterly and westerly direction. On the north side of the tracks in the City of La Salle, the company maintains a passenger station. West of the station and on the north side of the track, is a brick platform extending westerly for several hundred feet. For a distance of forth or fifty feet east of the station and running parallel with and between the tracks for a distance of about one block west of the station, is a cinder walk. This cinder walk is used by the employees of the company in loading and unloading mail and express on the passenger trains of the defendant company. It is also used by passengers in boarding and getting off of the trains.

On the morning of February 18, 1928, Charles L. Elward had been to his place of employment at Smith-Adams Company on the south side of said railroad tracks. After a conversation with other employees and officers of the company, he left the office, presumably on his duties as a salesman for said company. That was the last that he was ever seen alive.

John M. Gould, a fellow salesman, was at the office of the

In the Appellate Court of Illinois

Second District

October Term, A. D. 1925

Thomas J. Dineen, Administrator

of the Estate of Charles L. Dineen,

Deceased,

Appellant from the Circuit

Court of the State

Appellee

County, Illinois

vs.

The Chicago, Rock Island & Pacific

Railway Company, a corporation,

Appellee

File, 1:

The defendant railway company has a double track railway running through the City of La Salle, Illinois, in an easterly and westerly direction. On the north side of the tracks in the City of La Salle, the company maintains a carmen station. West of the station and on the north side of the track, is a prior platform extending westerly for a distance of about one block west of the station, is a single walk. This cinder walk is used by the employees of the company in loading and unloading mail and express in the passenger train of the defendant company. It is also used by the company in passing and setting off of the trains.

On the morning of February 13, 1925, Charles L. Dineen had been to the place of employment at Smith-Spence Company on the north side of said railroad track. After a conversation with other employees and officers of the company, he left the office, presumably on his way as a salesman for said company. That was the last that he was ever seen alive.

John M. Gould, a fellow salesman, was at the office of the

company at the same time and saw Elward leave the office about 7:30 A. M. Gould left the office a minute or two later. He went eastward to what is known as Creve Coeur street, and then turned north towards the railroad tracks across said street. As he approached the railroad tracks the gates were down across the street and the Golden State Limited, a train of the defendant's known as eastbound No. 4, was passing over the crossing. It was travelling at the approximate rate of 40 to 45 miles per hour, on the eastbound tracks of the defendant, a freight train was going west on the westbound tracks at a speed of 15 miles per hour. The engine of the freight train was west of the crossing and the rear end of the train was somewhere east of the passenger station. The Golden State Limited did not stop, but disappeared in the distance to the east. After it had passed, Gould saw the body of Elward lying on the platform between the two main tracks. The back portion of his head had been crushed and he was apparently dead at the time Gould discovered him.

Thomas J. O'Meara, administrator of the Estate of Charles L. Elward, started suit in the Circuit Court of La Salle County, Illinois, to recover damage for the death of the deceased, alleging that his death was caused by the negligent operation of the passenger train of the defendant. The declaration consisted of eight counts. The first count was a general negligence count. The second and third counts allege a violation of the ordinances of the City of La Salle limiting the speed of trains. The fourth count alleges the operation of a train at an excessive rate of speed. The fifth, sixth, seventh, and eighth counts are identical respectively with the second, third and fourth counts, except that each of them alleges that the defendant was then and there engaged in inter-state commerce. To this declaration, the defendant pleaded the general issue. A jury was empaneled to try the case, and at the close of the plaintiff's testimony, on motion of the defendant, the court instructed the

company at the same time and was found leaving the station about 7:50 A. M. I could not find the office of the company, so went eastward to what is known as Union Station, and then turned north towards the railroad tracks some distance away. In the middle of the railroad track the gates were found across the street and the Golden State Limited, a train of the defendant, was seen passing over the crossing. It was traveling at the approximate rate of 40 to 45 miles per hour, on the westward track of the defendant, a freight train was seen west of the westbound track at a speed of 15 miles per hour. The freight train was west of the crossing and the rest of the train was somewhere east of the passenger station. The Golden State Limited did not stop, but disappeared in the distance to the east. After it had passed, I could not find the point of crossing on the platform between the two main tracks. The front portion of the freight train had been crushed and it was not long before at the time I discovered it.

Thomas J. O'Brien, administrator of the estate of William J. O'Brien, stated that in the district court of La Salle County, Illinois, to recover damages for the death of the deceased, William J. O'Brien, who was caused by the freight train of the defendant. The defendant was caused by the passenger train of the defendant. The first count was a general negligence count. The second and third counts were a violation of the defendant of the City of La Salle limiting the speed of travel. The fourth count was the operation of a train at an excessive rate of speed. The fifth, sixth, seventh, and eighth counts are identical respectively with the second, third and fourth counts, except that each of them alleges that the defendant was then and there engaged in an excessive count. A jury declaration, the defendant alleged the general law. A jury was engaged to try the case, and the jury of the plaintiff testimony, on behalf of the defendant, the jury instructed the

jury to "find the defendant not guilty." The jury found as instructed, judgment was entered on the verdict dismissing the case at plaintiff's cost, and he brings it here to this court on appeal for review.

The first question raised by the appellants in support of their contention is that the court erred in directing the jury to find the issues for the defendant, as they did. They claim they made a prima facie case of negligence in showing the rate of speed at which the passenger train in question was traveling at the time it passed through the City of La Salle, and that the plaintiff's intestate was killed; that the jury should have been permitted to pass upon the question whether this rate of speed at which this train was traveling was such a negligent operation of the train that it was the proximate cause of the death of the deceased. It will be observed in the declaration filed by the plaintiff, that in no count do they charge 'a wanton or wilful' act of the defendant, but all of the counts charge negligence of the defendant of some kind in the operation of its train.

There was no eye-witness to the accident and no one knows as far as the record discloses what caused the death of Elward. Whether he was struck by the appellee's passenger or freight train, no one knows. The appellants charge in their declaration that he was struck by the passenger train and killed. The burden of proof was upon the appellants to establish this fact. While such facts may be established by circumstantial evidence still the facts and circumstances relied upon to prove such an allegation must be more than a mere guess or conjecture or surmise. *Anderson v. Chi. R. I. & Pac. Ry.* 242 App. 337; *Ohio Vault Building Company vs. The Industrial Board of Illinois*, 277 Ill. 96; *O'Connor vs. Aluminum Ore Company*, 224 Ill. App. 613. Such facts cannot be established by circumstantial evidence unless they are of such a nature and so related to each other that the only reasonable conclusion that can be drawn from such facts and circumstances

jury to "find the defendant not guilty." The jury found as instructed, judgment was entered on the verdict electing the case at plaintiff's cost, and he asked if there is any point on appeal for review.

The first question raised by the defendant in support of their contention is that the jury were in error in finding the defendant liable for the death of the passenger. The defendant made a prima facie case of negligence in showing that at the time at which the passenger was in question the train was passing through the City of La Salle, and that the passenger was killed; that the jury should have been permitted to pass upon the question whether this was or was not a negligent operation of the train, and that it was the proximate cause of the death of the passenger. It will be observed in the declaration filed by the plaintiff, that no count is set out charging the defendant with negligence, but all of the counts charge negligence of the defendant of some kind in the operation of its train.

There was no evidence as to the accident, and no evidence as far as the record discloses that caused the death of the passenger. Whether he was struck by the engine or the train is not known. The plaintiff's evidence in this regard is that he was struck by the passenger train and killed. The burden of proof was upon the defendant to establish that fact. It is well known that may be established by circumstantial evidence which will show facts and circumstances which would lead to the conclusion that more than a mere guess or conjecture is involved. In this case, the Illinois Central R. Co. v. La Salle, 174 Ill. 400, 1905, 1906, 1907, 1908, 1909, 1910, 1911, 1912, 1913, 1914, 1915, 1916, 1917, 1918, 1919, 1920, 1921, 1922, 1923, 1924, 1925, 1926, 1927, 1928, 1929, 1930, 1931, 1932, 1933, 1934, 1935, 1936, 1937, 1938, 1939, 1940, 1941, 1942, 1943, 1944, 1945, 1946, 1947, 1948, 1949, 1950, 1951, 1952, 1953, 1954, 1955, 1956, 1957, 1958, 1959, 1960, 1961, 1962, 1963, 1964, 1965, 1966, 1967, 1968, 1969, 1970, 1971, 1972, 1973, 1974, 1975, 1976, 1977, 1978, 1979, 1980, 1981, 1982, 1983, 1984, 1985, 1986, 1987, 1988, 1989, 1990, 1991, 1992, 1993, 1994, 1995, 1996, 1997, 1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 2180, 2181, 2182, 2183, 2184, 2185, 2186, 2187, 2188, 2189, 2190, 2191, 2192, 2193, 2194, 2195, 2196, 2197, 2198, 2199, 2200, 2201, 2202, 2203, 2204, 2205, 2206, 2207, 2208, 2209, 2210, 2211, 2212, 2213, 2214, 2215, 2216, 2217, 2218, 2219, 2220, 2221, 2222, 2223, 2224, 2225, 2226, 2227, 2228, 2229, 2230, 2231, 2232, 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3727, 3728, 3729, 3730, 3731, 3732, 3733, 3734, 3735, 3736, 3737, 3738, 3739, 3740, 3741, 3742, 3743, 3744, 3745, 3746, 3747, 3748, 3749, 3750, 3751, 3752, 3753, 3754, 3755, 3756, 3757, 3758, 3759, 3760, 3761, 3762, 3763, 3764, 3765, 3766, 3767, 3768, 3769, 3770, 3771, 3772, 3773, 3774, 3775, 3776, 3777, 3778, 3779, 3780, 3781, 3782, 3783, 3784, 3785, 3786, 3787, 3788, 3789, 3790, 3791, 3792, 3793, 3794, 3795, 3796, 3797, 3798, 3799, 3800, 3801, 3802, 3803, 3804, 3805, 3806, 3807, 3808, 3809, 3810, 3811, 3812, 3813, 3814, 3815, 3816, 3817, 3818, 3819, 3820, 3821, 3822, 3823, 3824, 3825, 3826, 3827, 3828, 3829, 3830, 3831, 3832, 3833, 3834, 3835, 3836, 3837, 3838, 3839, 3840, 3841, 3842, 3843, 3844, 3845, 3846, 3847, 3848, 3849, 3850, 3851, 3852, 3853, 3854, 3855, 3856, 3857, 3858, 3859, 3860, 3861, 3862, 3863, 3864, 3865, 3866, 3867, 3868, 3869, 3870, 3871, 3872, 3873, 3874, 3875, 3876, 3877, 3878, 3879, 3880, 3881, 3882, 3883, 3884, 3885, 3886, 3887, 3888, 3889, 3890, 3891, 389

is that Elward was killed by being struck by the passenger train of the appellee. Under the facts and circumstances in this case, it seems to us it is much more reasonable to presume that the freight train caused the death of plaintiff's intestate rather than the fast moving passenger train. In fact, there is no evidence in the record as to the manner in which the deceased met his death.'

The evidence shows that Elward had worked for Smith-Adams Company for quite a number of years; that he was down at the office and crossed the Rock Island track practically every day; that on the morning he was killed he had been at the office and was going to sell groceries for his firm; that the accident happened about 7:30 A. M., and there was no train on the Rock Island Railroad that was due to stop at this station until 10 A.M., that trains were frequently passing on the west-bound or east-bound track, or both at any time.' The evidence further shows that Mr. Elward had been in good health and there were no defects in his hearing, and so far as the record discloses there was no reason why he should walk on this cinder path between the tracks of the defendant rather than go on the north side where the brick pavement is, or go on up Creve Coeur street up to First Street.' Whether the deceased was a trespasser on appellee's property, under our view of the case it is not necessary for us to decide, for we think the record discloses that the deceased Elward was negligent in walking at the side of this freight train when he knew that another train was liable to come in from the west at any time, and it was his negligence that was the proximate cause that produced his death.'

In our opinion the Circuit Court of La Salle County committed no error in directing a verdict for the defendant and dismissing the case at plaintiff's cost.'

The judgment of the Circuit Court of La Salle County is hereby affirmed.'

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of the special. Under the facts and circumstances in this case,
it seems to me it is much more probable to believe that the
freight train caused the death of Edward than the passenger train.
than the fact having occurred. In fact, there is no
evidence in the record as to the manner in which the accident
occurred.
The evidence shows that Edward was working for the
Company for quite a number of years; that he was born in the
office and crossed the local freight track practically every day.
that on the morning he was killed he had been at the office and
was going to self-proceed for his trip; that the accident
happened about 7:30 A. M., and there was no train on the track
Edward believed that was due to stop at this station until 10 A. M.,
that train were frequently passing on the west-bound or west-bound
track, on both of my lines. The evidence further shows that
Edward had been in good health and there was no defect in the
bearing, and as far as the record disclosed there was no reason
why he should walk on top of the freight train, and that of the
defendant rather than to go on the freight train. The fact that
went to, or to on my freight train up to that station. Further
the defendant was a trespasser on the local freight train, and
view of the case it is not necessary for me to believe that
think the record disclosed that the defendant Edward was walking
in walking at the side of the freight train, and he was struck
another train was liable to come in from the east at any time,
and it was his negligence and not the negligence of the
defendant which caused his death.
In my opinion the fact that Edward was walking on the
freight train is a material fact, and it is not necessary for me to
believe that the defendant was walking on the freight train at the
time of the accident.
The judgment of the district court is affirmed.
herby affirmed.

STATE OF ILLINOIS.

SECOND DISTRICT

} ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and thirty-_____

Clerk of the Appellate Court

787
AT A TERM OF THE APPELLATE COURT.

Begun and held at Ottawa, on Tuesday, the second day of February, in the year of our Lord one thousand nine hundred and thirty-two, within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.

Hon. FRED G. WOLFE, Justice.

Hon. JAMES S. BALDWIN, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

265 I.A. 617³

BE IT REMEMBERED, that afterwards, to-wit: On
MAR 15 1932 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

October Term, A. D. 1931

Adam Wixes,

Appellee,

vs.

Appeal from the Circuit Court

Keig-Stevens Baking Co.,

of Winnebago County.

Appellant

WOLFE, J:

In the Circuit Court of Winnebago County, the appellee secured a verdict and judgment against the appellant in an action for personal injuries sustained by the appellee in a collision of a truck being driven by a servant of the appellant, and a bicycle which appellee was riding on South Main street in the City of Rockford. The collision occurred about 5:30 o'clock on the morning of February 19, 1930. As the two vehicles approached each other the appellee was propelling his bicycle toward the north, on the east side of the street and the truck was being driven toward the south on the same street, as they came near to Knowlton street, which intersected South Main Street--at least, such was the situation for a short time fore the accident. As the case must be reversed for a new trial, and as many of the circumstances leading to and causing the accident are a matter of dispute between the parties, further particulars concerning the collision will not be stated.

After examining the record and the briefs, this court has decided to consider two of the errors assigned by the appellant for a reversal of the judgment. A statement of the salient features of the case will serve as a foundation upon which to rest the decision of the court.

One of the material questions in the case is the location of the accident, that is, whether it occurred at the intersection of South Main and Knowlton Streets, or at a place south of Knowlton street. The testimony is in conflict on this point, and there are also circumstances in the evidence from which deductions may be fairly drawn to establish the place of the accident. The testimony of the appellee and the testimony of the truck driver are in opposition on the material question whether or not the head-lights on the truck were lighted and whether the truck was being driven upon the east or west side of the center of South Main street prior to and at the time of the accident. It is undisputed that at the time of the collision, and prior thereto, that the appellee was riding his bicycle upon the street without a light upon the front thereof in violation of an ordinance of the City of Rockford. It is a matter of contention between the parties as to whether the appellee was in the exercise of reasonable care for his own personal safety when the evidence shows his violation of the ordinance and the facts, proved by the evidence, tend to show that the truck was making a loud noise and its lights were turned on before and at the time of the collision. There is evidence in the case to prove that it was foggy at the time of the accident.

The second, third and fourth instructions given to the jury at the request of the appellee are in two respects similar, and the giving of these instructions in the form in which they appear and their affect upon the jury under the facts in the case, is assigned as error by the appellant.

Instruction number two told the jury that even though the jury believed that the appellee was riding his bicycle without a light in violation of the city ordinance, yet, unless the jury further believed that the absence of the light contributed to the injury, then the fact that the appellee had no light on his bicycle would not defeat his right to recover, if the jury believed that he was otherwise entitled to recover under the evidence and guided by the in-

structions of the court. Instruction number three stated that, notwithstanding the fact that the appellee did not have a light on the front of his bicycle, yet it was a question for the jury to determine from all the evidence in the case, if the appellee was guilty of contributory negligence, and if the jury believed from all the evidence that the appellee was not guilty of contributory negligence, then the jury should find that he was in the exercise of reasonable care. Instruction number four told the jury that even though the jury believed that the appellee violated the city ordinance by not having a light on his bicycle, yet, the jury, in determining the contributory negligence of the appellee, might consider all the facts and circumstances shown by the evidence, and if the jury believed from a preponderance of the evidence that the appellee at all times prior to the collision acted as a reasonably careful and prudent man would have ordinarily acted under the same circumstances, then the jury were instructed to find that the appellee was not guilty of contributory negligence, even though he did not have a light upon the front of his bicycle. In no other instructions given were other facts and circumstances appearing in the evidence, and bearing on the question of contributory negligence, mentioned.

The question of the contributory negligence of the appellee was to be decided by the jury from all the facts and circumstances appearing in the evidence which were pertinent to that issue, including of course, a determination if the violation of the ordinance by the appellee proximately contributed to the accident in which the appellee was injured. (*Jeneary v. C. & I. Traction Co.*, 306 Ill. 392) The violation of the ordinance was one of the facts appearing in the evidence to be considered by the jury in deciding the question of contributory negligence, but it was not the only material element shown by the evidence appertaining to that question.

Without indicating any view of this court on the question of fact relative to the care exercised by the appellee for his own

safety, it may be pointed out, without injustice to either party, that the violation of the ordinance by the appellee was an important fact in the case bearing on the question of contributory negligence. Considering all the facts in the evidence, we have concluded that the fact of the violation of the ordinance by the appellee should not have been stated in the three instructions and by their following terms minimized the act of the appellee in violating the ordinance. Instructions in such form have been disapproved by the Supreme Court. The tendency of instructions of that character is to minimize the weight to be given to each particular item so singled out, and so to minimize the weight of all the evidence.' (People vs. Spaulding, 309 Ill. 292; South Chicago City Ry., v. Dufresne, 200 Ill. 456; Slack v. Harris, 200 Ill. 96). In an instruction, "it is not proper to direct attention to a single item of evidence which in itself alone, would not be conclusive. That might be done in any case as to every single item of evidence not conclusive in itself, with the effect to destroy the aggregate effect of all the evidence." Drda v. Drda, 298 Ill. 278.'

An understanding of the main features of the case demonstrates that the existence of negligence, whether of the appellant or the appellee, depended upon a variety of circumstances, considered not as isolated occurrences, but altogether, and in view of their relation to and reaction upon each other. To draw a conclusion as to the conduct of the parties under such circumstances thus connected is of the very essence of the jury function. (Sutton v. Bell, 79 N.J. 507, 77 Atl. 42.). And this is especially true when the testimony on material facts is in conflict. Applying this principle of law, we decide the instructions numbered five and six, given at the request of the appellee, and which directed a verdict upon the facts specified in the instructions, are erroneous as not including disputed material elements of fact that the truck was traveling at a slow rate of speed, carried lights which were turned on, and that the truck made a loud noise as it approached the appellee.

From what has been said it is clear that the giving of all of the instructions mentioned was reversible error, and appellants assigned error on the giving of these instructions must be sustained. The evidence on material facts in the case being in conflict, and the question of credibility of the witnesses being involved the other assigned error of the appellant that the verdict of the jury is palpably against the weight of all of the evidence in the case, cannot be sustained. The judgment is reversed and case remanded.

Reversed and remanded.

STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and thirty-_____

Clerk of the Appellate Court

797
AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the second day of February, in
the year of our Lord one thousand nine hundred and thirty-two,
within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.

Hon. FRED G. WOLFE, Justice.

Hon. JAMES S. BALDWIN, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

265 I.A. 617⁴

BE IT REMEMBERED, that afterwards, to-wit: On
MAR 15 1932 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

October Term, A.D. 1931.

C. O. Holmberg, Olaf A. Peterson,
and David Nyberg, Co-partners
doing business as Highland Lumber
& Fuel Co.,

Appellants,

vs.

Appeal from the Circuit Court
of Winnebago County.

Erick Lundquist, Selma Lundquist,
W.H. Meyerstein, Howard Gordon,
and Georgia Wilson,
Appellees.

WOLFE, J:

C. O. Holmberg, Olaf A. Peterson and David Nyberg, who had been doing business under the trade name of Highland Lumber & Fuel Company brought suit in the Circuit Court of Winnebago County against Erick Lundquist, W.H. Meyerstein, Howard Gordon and Georgia Wilson to foreclose a mechanics lien. The bill alleges that the complainants were partners doing business as Highland Lumber & Fuel Co.; that they were engaged in selling lumber, mill-work, building material, etc., in the City of Rockford, Illinois; that on May 7th, 1929, Erick Lundquist, one of the defendants, applied to them to purchase certain lumber and building materials for a house to be erected on premises described in the City of Rockford, as Lots 114 and 115 of Second Factory Addition to the City of Rockford.

The bill further alleges that Lundquist owned the real estate in fee simple at the time of the contract for the purchase of the building material; that the contract entered into between the petitioners and Lundquist was a verbal one by which the petitioners were to furnish the lumber and building materials for the erection of a house as specified and ordered by the said Lundquist and for the said materials the said Lundquist should pay the reasonable and customary price

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DIVISION

October term, A.D. 1901.

E. O. Holmberg, Olaf A. Peterson,
and David Lyberg, Co-defendants
doing business as Highland Lumber & Coal Company,
vs.

Appellants,

vs.

Erick Lundquist, Selma Lundquist,
W. M. Meyerstein, Howard Gordon,
and Georgia Wilson,
Appellees.

FILED, 11

E. O. Holmberg, Olaf A. Peterson and David Lyberg, who had been
doing business under the trade name of Highland Lumber & Coal Company
brought suit in the Circuit Court of Cook County against Erick
Lundquist, W. M. Meyerstein, Howard Gordon and Georgia Wilson to re-
ceive a mechanical lien. The bill alleges that the complainants were
partners doing business as Highland Lumber & Coal Co.; that they were
engaged in selling lumber, mill-work, building material, etc., in the
City of Rockford, Illinois; that on May 17th, 1900, Erick Lundquist,
one of the defendants, applied to them to purchase certain lumber
and building materials for a house to be erected on property located
in the City of Rockford, on lots 114 and 115 of Second Township, Section
to the City of Rockford.

The bill further alleges that Lundquist owned the land where the
house was to be erected at the time of the contract for the purchase of the build-
ing materials; that the contract entered into between the petitioners
and Lundquist was a verbal one by which the petitioners were to furnish
the lumber and building materials for the erection of a house as
specified and ordered by the said Lundquist and that the said petitioners
the said Lundquist should pay the same in cash and otherwise.

therefor thirty days after the delivery thereof; that the petitioners made deliveries of lumber and building materials for the construction of said house until about July 25, 1929. All of said deliveries were made upon the premises where the building was to be erected and described in the bill of complaint; that the house was actually erected upon said lots and that the lumber and building materials furnished by the petitioners were actually used in the construction of the said house; that said materials so furnished were all of good quality and according to specifications, and that the house constituted a valuable and permanent improvement upon the premises.

The bill further alleges that the said Lundquist ordered from the petitioners all of the lumber and materials so furnished, and that an itemized statement together with the reasonable and customary prices of all the said articles were attached to said bill, and marked Exhibit "A", and made a part thereof; that the total reasonable and customary price for the same was \$939.70; that Lundquist had neglected and refused to pay the petitioners for the lumber so furnished, and that they were entitled to a lien upon the premises for the same.

It is further alleged that on September 25, 1929, the petitioners filed in the office of the Clerk of the Circuit Court of Winnebago County, Illinois, a claim for a lien for the materials furnished aforesaid, which claim was duly entered in the lien docket of said clerk; that a copy of said claim was attached to the bill and made a part thereof. The bill further alleges that the defendants Meyerstein, Gordon, and Wilson have, or claim to have some interest in the premises as purchasers, mortgagees, judgment creditors, or otherwise; that the defendant, Selma Lundquist, is the wife of Erick Lundquist; that she knew of said improvement being made upon the property aforesaid and assented thereto, and that any claims that any of these defendants had in said premises were subordinate to the claim of the petitioners.

Attached to the bill of complaint was an itemized statement of the materials furnished by the complainants to the defendant Lundquist of the total value of \$939.70. A copy of the claim for a mechanic's

therefor thirty days after the delivery thereof; that the petitioners made deliveries of lumber and building materials for the construction of said house until about July 25, 1925. All of said deliveries were made upon the premises where the building was to be erected and were credited in the bill of commodities; that the house was actually completed upon said lot and that the lumber and building materials furnished by the petitioners were actually used in the construction of the said house; that said materials so furnished were all of good quality and according to specifications, and that the house constructed is valuable and permanent improvement upon the premises.

The bill further alleges that the bill of commodities ordered from the petitioners all of the lumber and materials so furnished, and that an itemized statement together with the reasonable and customary prices of all the said articles were attached to said bill, and marked Exhibit "A", and made a part thereof; that the total reasonable and customary price for the same was \$252.70; that respondents had neglected and refused to pay the petitioners for the lumber so furnished, and that they were entitled to a lien upon the premises for the same.

It is further alleged that on September 22, 1925, the petitioners filed in the office of the Clerk of the Circuit Court of Adams County, Illinois, a claim for a lien for the materials furnished above said, which claim was duly entered as the first claim of said order; that a copy of said claim was attached to the bill and made a part thereof. The bill further alleges that the defendants, respondents, Gordon, and Alison have, or claim to have, been interested in the premises as purchasers, mortgagees, judgment creditors, or otherwise; that the defendant, Selma Handout, is the wife of said respondents; that she knew of said improvement being made upon the premises above said and assented thereto, and that any claim that any of these defendants had in said premises were subordinate to the claim of the petitioners. Attached to the bill is a complaint and a bill of lading of the materials furnished by the respondents to the defendant, Selma Handout, of the total value of \$252.70. A copy of the claim for a mechanic's

lien was also attached to the bill and marked Exhibit "B". In this claim for a lien the Highland Lumber & Fuel Company is designated a corporation, and the claim purports to be filed against H. W. Myerstein of Whitehall, Green County, Illinois, and states that on the 7th day of May, 1929, Lundquist, a contractor, made and entered into an oral contract with the claimant; that under the terms of the contract the claimant was to furnish said contractor Lundquist, lumber, sash, doors, trim, etc., for a house at 2938 Lapey Street, and that the claimant was to receive the sum of \$939.70; that the complainant completed its contract July 25, 1929, and there was due to it, after allowing the credits and deductions from said Lundquist, \$939.70; that the claimants claimed a lien upon said lots Nos. 114 and 115 of Second Addition to the City of Rockford and the improvements thereon. The bill closes with the usual prayer for relief and summons, etc.

Selma Lundquist, wife of Erick Lundquist, filed a separate answer in which she alleges that she does not know of her own knowledge that the complainant furnished the materials in question for the building, and she is not, as a matter of law, in any way liable for said bill of goods alleged to have been furnished to her husband, Erick Lundquist.

Erick Lundquist filed his separate answer in which he alleges that on the 17th day of March, 1930, he filed his petition in voluntary bankruptcy in the United States District Court for the Northern District of Illinois; that a hearing was set therefor on April 14, 1930, for the first meeting of creditors, and that the name of the petitioners herein was listed in said bankruptcy proceedings as a creditor, and that the complainant had been given notice of the said bankruptcy proceedings.

The defendant Howard Gordon-- whose interest in the subject matter is not shown-- filed a general and special demurrer to the bill of complaint and assigned several causes therefor. The cause

lish was also attached to the bill and which provided that, in
this clause for a lien the defendant should be liable
designated a corporation, and the other parties to be liable
against R. T. Everett of Whitehall, Green County, Virginia,
and states that on the 7th day of May, 1900, defendant, a com-
-treator, made and entered into an oral contract with the plain-
ant; that under the terms of the contract the defendant was to
purchase said contractor defendant, lumber, seed, grain, etc.,
etc., for a house at 2238 Lafayette Street, and that the plaintiff
was to receive the sum of \$330.00; that the defendant completed
its contract July 25, 1900, and there was due to it after July
July the credits and debits from said defendant, \$330.00;
that the defendant claimed a lien upon said house and the
of second addition to the City of Norfolk and the defendant
thereon. The bill closes with the usual prayer for relief and
damages, etc.

Seina defendant, wife of Brick defendant, filed a motion to
answer in which she alleges that the bill was not part of her own
knowledge that the complaint furnished the defendant in question
for the building, and she is not, as a matter of fact, in any way
liable for said bill or goods alleged to have been furnished to her
husband, Brick defendant.

Brick defendant filed his separate answer in which he alleges
that on the 17th day of March, 1900, he filed his petition in
voluntary bankruptcy in the United States District Court for the
Northern District of Virginia; that a receiver was set therefor on
April 14, 1900, for the liquidation of creditors, and that the
name of the defendant herein was listed in said bankruptcy and
proceedings as a creditor, and that the complaint had been given
notice of the said bankruptcy proceedings.

The defendant herein denies - some interest in the subject
matter is not shown - filed a verified and sworn statement to the
bill of complaint and assigned several causes therefor. The same

came on for hearing on the bill and demurrer, and the court sustained the demurrer and gave the complainants leave to amend the bill.'

The complainants filed an amendment to the original bill by adding thereto the allegations that Erick Lundquist was engaged in the contracting business generally, but he was the owner of the property in question at the time he ordered and at the time said goods were furnished to him; that he divested himself of the title to said premises in some manner unknown to the complainants after the date of the contract and after the materials for the building had been furnished to him by the complainants. The bill further alleges that the Highland Lumber & Fuel Company was a partnership and was not, and never had been, a corporation; and that there was no corporation by that name; that in the claim for the lien referred to, the partners of the Highland Lumber & Fuel Company were erroneously described as a corporation; and that the said C. O. Holmberg, who signed said claim for the lien, was at the time thereof employed by the petitioners as their agent. That the designation of the Highland Lumber & Fuel Company as a corporation was not for the purpose of misleading any one or depriving anyone of their rights, or for the purpose of gaining any advantage, but was wholly an error. That the claim for lien was not filed upon the theory that the defendant Erick Lundquist was a contractor, or a subcontractor, but it was filed upon the theory that he was the owner of the premises at the date of entering into the contract and that there was due to the complainants from said Lundquist the sum of \$939.70.'

To the amended bill of complaint Howard Gordon filed his demurrer and assigns as reasons therefor substantially the same reasons as filed to the first demurrer. The court on a hearing sustained the demurrer to the bill of complaint as amended, and entered an order that the complainant's bill of complaint be dismissed for want of equity. To which order the complainants have perfected an appeal to this court.'

came on for hearing on the bill and answer, and the court sustained the demurrer and gave the complainants leave to amend the bill.

The complainants filed an amendment to the original bill by adding thereto the allegations that such land had been conveyed in the contracting business generally, but as was the case of the property in question at the time he ordered it at the time said goods were furnished to him; that he received payment of the bill to a bill received in some manner referred to the complainants after the date of the contract and after the material had been furnished to him by the complainants. The bill further alleges that the Highland number 1 Fuel Company was a corporation and was not, and never had been, a corporation; and that there was no corporation by that name; that in the claim for the item referred to, the parties to the Highland number 1 Fuel Company were erroneously described as a corporation; and that the said H. B. Holmberg, who signed said claim for the item, was at the time thereof employed by the petitioners as their agent. That the description of the Highland number 1 Fuel Company as a corporation was not for the purpose of misleading any one or deceiving anyone of their rights, or for the purpose of obtaining any advantage, but was merely an error. That the claim for item was not filed upon the theory that the defendant took payment was a contract, or a sub-contractor, but it was filed upon the theory that he was the owner of the premises at the date of entering into the contract and that there was due to the complainants from said defendant the sum of \$339.70.

To the amended bill of complaint against said defendant the demurrer and answer as reasons therefor and stating the same reasons as filed to the first demurrer. The court on a hearing sustained the demurrer to the bill of complaint as amended, and entered an order that the complainant's bill of complaint be dismissed for want of equity. To which order the complainants have moved an appeal to this court.

The only question presented to this court is whether the bill states a good cause of action. The first clause of the demurrer asserts that the claim for lien filed in this case purports to be filed by the Highland Lumber & Fuel Company, a corporation, while the bill of complaint states that said Highland Lumber & Fuel Company is a co-partnership, doing business under that name, and that such variance in the description of the petitioner is a fatal discrepancy. In our opinion this is not a fatal discrepancy. It has been held that an exhibit is not any part of the complaint, and defects therein cannot be reached by demurrer. (Schroth vs. Black, 50 App. p. 171)

The purpose of a bill of complaint is to give notice to the opposing party or parties what, the complainants claim, is their cause of action against them. This bill set forth that the Highland Lumber & Fuel Company furnished certain building materials to Erick Lundquist to be used in the erection of a house on certain described premises. The claim for a lien correctly discloses the proper name of the complainants and it is properly verified by one of its members and agents, and the statute has been complied with in this particular. We do not see how this error could in any way affect the merits of the case, or in what way the defendants, or any of them, could be misled as to the allegations of the amended bill of complaint.

The second ground for demurrer is that the purported claim for lien does not contain sufficient statements of the alleged contract to support the petition for lien filed in said case, and is not altered by the original bill or the amendment thereto. We do not think there is any merit in this contention.

The third assignment of demurrer is that the said claim for lien discloses on its face that the said claimants were sub-contractors and suit was not filed within four months of the date of the maturity of said indebtedness as required by statute. It is true that in the claim it is said that appellant claims a lien against W. H. Meyerstein and Lundquist, and Lundquist is described as a contractor, but nothing in the claim for lien supports the position of Gordon that the claimants are sub-contractors and that Lundquist was acting as a contractor

rather than owner at the time the contract was made. We think there is no merit in this special assignment of demurrer.

The fourth assignment is that said amendment to the bill is not specific concerning alleged divesting of title by the defendant Erick Lundquist. If this becomes material we think it will be a matter of proof and not of pleading. We do not believe it is any reason for demurrer, nor material to the issues in the case.

The fifth cause for demurrer is that the purported claim for lien is vague, indefinite and insufficient in law or equity to support any asserted, lien, or to protect the lien rights of the complainants. The claim for such a mechanic's lien filed in this case is possibly not drawn with as much exactness and carefulness as it could have been done, yet, for all practical purposes we deem it sufficient to show to anyone what is charged in the bill and give to them all the information required by the statute to be shown, and in our opinion it is a substantial compliance with the statute.

The sixth cause of demurrer is, that the complaint is vague, indefinite and uncertain. We deem this is without merit for the reason above stated.

The statutes creating mechanic's liens are frequently said to be subject of a strict construction. This, however, refers to matters of substance and not to mere formalities. A claim for a lien which meets the substantial requirements of the statute should, in our opinion, not be defeated by immaterial matters which do not go to the merits of the case. The statute in express terms provides that a mechanic's lien shall not be defeated as to the actual amount due because of error in amount due, or even if an overcharge is made, if no fraud is shown. The purpose of a mechanic's lien appears to be to give notice to the world of the existence of the lien, rather than the absolute certainty of the actual rights of the parties.

In this case the amended bill set forth that the filing of the claim as a partnership was a mistake and that no fraud was intended, or any advantage meant to be taken of anyone. We do not see how any of the defendants could be misled, or damaged by this mistake, since

rather than owner at the time the contract was made. It follows

there is no merit in this special assignment of ownership.

The fourth assignment is that said assignment is too late

is not a specific assignment alleged to have been made

defendant which defendant. It is not necessary to say that it will

be a matter of proof and not of pleading. It is not necessary to say

any reason for defendant, nor attempt to show the reason for the case.

The fifth cause for defendant is that the assignment is too late

lien is vague, indefinite and insufficient to set on record to

support any asserted. Lien, or to establish the lien rights of the

complaint. The claim for such a specific lien is too

case is possibly not shown with as much exactness and certainty

as it could have been done, yet, for all practical purposes we

have it sufficient to show to support what is alleged in the bill

and give to them all the information required by the statute to be

shown, and in our opinion it is a substantial compliance with the

statute. The sixth cause of defendant is, that the assignment is vague,

indefinite and uncertain. We have this in the bill itself for the

reason above stated.

The statutes creating mechanic's liens are generally said to

be subject of a strict construction. This, however, refers to matters

of substance and not to mere formalities. It is said for a lien which

meets the substantial requirements of the statute is valid, in our

opinion, not be defeated by technical matters which do not go to

the merits of the case. The statute in question provides that

a mechanic's lien shall not be defeated as to the actual amount due

because of error in amount due, or when it is ascertained by sale,

if no fraud is shown. The purpose of a mechanic's lien statute is

to give notice to the world of the existence of the lien, rather

than the absolute certainty of the return of the value.

In this case the amended bill will show that the lien of the

claim as a partnership was a lien and that no fraud was intended,

or any advantage sought to be taken of anyone. We do not see how any

of the defendant could be aided, or harmed by this alleged claim.

they were advised fully, both from the claim itself and the amended bill of complaint of the actual claim due the complainants and what the contract was that was entered into. The place where the lumber was delivered and every detail that was necessary is set forth to advise them of the claim of the petitioners.' (Richards vs. Concord Apartment House Co., 93 App. 302; Interstate Building Association vs. Ayers, 177 Ill. 9; Culver vs. Schroth, 153 Ill. 437; Smith vs. Adcock, 209 App. 277; Glencoe State Bank vs. Cole, General No. 8358, decided in this court at this term.)

In our opinion the court erred in sustaining the demurrer to the amended bill of complaint, and in dismissing the bill for want of equity. The decree should be reversed and cause remanded to the trial court with directions to overrule the demurrer to the bill.'

Reversed and remanded with direction.'

STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and thirty-_____

Clerk of the Appellate Court

*Abstract
Opinion filed Feb-1-1932*

3 A

265 I.A. 617⁵

General No. 8597

Agenda No. 50

October Term, A. D. 1931

JANE CHUMARD, Appellee,

vs.

FRANK N. GOODMAN, et al., Co-Partners, doing
business as PARLOR MARKET, Appellants,

Appeal from Circuit Court, Macon County

ELDREDGE, J.

This is an appeal to reverse a judgment in the sum of \$5000.00 rendered on a verdict of a jury in an action on the case brought to recover personal injuries received in an automobile accident.

The declaration charges that appellants owned an automobile truck which through the negligence of its servant collided with the automobile in which appellee was riding resulting in certain injuries sustained by her. At the commencement of the trial it was admitted by appellants that its servant drove its truck in a careless and negligent manner against the automobile in which the plaintiff was riding and that through the negligence of the defendants and their servant in so driving the truck the plaintiff sustained injuries and that the plaintiff at, before and during the time of the accident was without fault on her part and that the injuries to her were the

direct and proximate cause of the negligence complained of. The only question which the jury had to determine in consequence of the above stipulation was the extent of the damages received by appellee. As a result of the accident the automobile in which appellee was riding was turned over on its side and she was found lying partly on the back cushion and partly on the rear door and appeared to be unconscious. She was taken to a hospital in an ambulance and Dr. Tearnan and Dr. Rose were called to attend to her. They arrived in about thirty minutes and by the time she had recovered consciousness, Dr. Rose testified that when he arrived at the hospital he discovered that appellee had sustained lacerations of the head, particularly over the left eye, also a contusion of the head, over the frontal area, and she also had sustained two fractured ribs on the left side; that she had a very definite tenderness in the lower left chest over the points of fracture of the ribs and the skin there was slightly discolored; that she was not unconscious at that time but was apparently suffering considerably from her contusions and cuts which she manifested by her restlessness and statements that she was suffering; that he had nothing to do with sewing up the cuts but that was done by another doctor; that she was taken to the operating room where the lacerations to the head were re-

paired and where the chest was strapped with adhesive; that she was brought back to her room and remained in the hospital three weeks; that he called upon her every day while she was in the hospital; she suffered considerable pain after the injury which continued for some time and she complained of some pain in her head even when she left the hospital but she gradually improved; while in the hospital she was confined to the bed until a few days before she left it, when she was allowed to sit up in a chair for a short time preparatory to her trip home; that he called upon her four different times after she went out to her sister's house where she was living and had prescribed some medicine for her at different times which would increase her appetite and strength, relieve her headache and pain and make her more comfortable. In answer to the question with respect to whether or not she will suffer pain in the future, or otherwise, he answered, "In my opinion, I couldn't say definitely how long these symptoms will linger, because they linger different lengths of time in different cases. One cannot predict how long the effect of such an accident will last." He further testified that he believed appellee had had a concussion of the brain which is a severe jarring of the brain due to the blow on the head. In answer to the question as to what effect a concussion of the brain would

have on appellee with respect to her walking, or having assistance, or in any other respect he answered, "A concussion of the brain, in a patient of her age might easily lead to persistent headaches and weakness for some time." He then testified that speaking with reasonable certainty that such condition might affect the patient for two or three years. On cross examination he testified that it might affect the patient a less time than that; that his statement was a general statement and that there is no reasonable certainty how long it might happen in this case; that the healing of the ribs was as desirable as could be and had made satisfactory progress in that regard; that after two or three months the pain should disappear from the broken ribs; that so far as he knew he didn't believe there was an injury to the skull; that he found no injury to the base of the skull in any way; that the lacerations on her face have all cleared up and are healed completely; that the ribs are healed and the contusion of the scalp is healed. He further stated:

"I believe what she is now suffering from is the after effect of the concussion of the brain, if she had one; I would not say how long that will continue, or whether it will continue at all or not, no living person knows."

Dr. Tearnan testified in substance that when he arrived at the hospital he found the patient in a condition of shock and

somewhat dazed; there was considerable blood about the face, due to lacerations over the eye; there was a hematoma, which is a blood clot in the scalp at the back of the head, on the left side; there was a general bruising of the face and body; two fractured ribs on the left side, low down, approximately the seventh and eighth; the patient was complaining of pain and she had a rather weakened pulse; she was conscious, but principally dazed and not conversational; he sutured the wound and strapped the chest to help splint the fractured ribs; the lacerations on the forehead were irregular and he continued to see the patient up to the 15th of November; while she was at the hospital he saw her daily and saw her after she left the hospital twice and made an examination of her condition at these times. He further testified as follows: "In a patient of the age and obese condition of Mrs. Chumard, the period of recovery is undoubtedly being considerably prolonged. I wouldn't venture to say whether it would be for the rest of her natural life or for a period of years— to make a positive statement. It is my opinion that there will be some evidence of reactions from this injury for the rest of the patient's natural life." He further testified that he had an x-ray made which showed no evidence of any fracture of the bones of the skull and further:—"Considering this patient's age, and her obese

condition, there is no positive way of saying in days, months, or years, how long a period the recovery may be protracted; it may be cleared up shortly, but I don't expect that to be the case; with reasonable certainty, I can say that some of this patient's distress or disturbances will undoubtedly last for a good many years; the symptoms I am talking about now are particularly the unsteady gait, and the tendency to headache; those occasionally clear up within a year or so, but more often in younger individuals."

Appellee herself testified that she was a widow and had lived with her sister and brother-in-law for the past fifteen years. She further testified:—"After I got out of the hospital my head was a whirling, and my vision has never been clear since, and my ribs, I suppose it is the ribs, it is the pain in my side, I have that all the time; I try to read but in a short time the letters blur, and then I can't see, and neither do I concentrate; after walking or standing, it is mostly stumbling, and I don't do very much walking; I usually get hold of something, or get near where I can get hold of something when I walk; I have a dizzy sensation in my nervous system or head when I do stand up or walk; I have fallen down; I am just weak all over."

Appellee further testified that before the accident she

had splendid health; cooked, washed dishes, tidied up the house, made beds, made the fire in the grate, and could walk a couple of miles at a time without tiring herself; before the accident her eyes were all right to read, or otherwise, and she could read as long as she wanted to; that she now has pain almost all the time and doesn't sleep very well.

Appellee's testimony in regard to her physical condition before and after the accident is corroborated by that of her sister and brother-in-law. Appellant placed on the stand two surgeons who testified as experts to a hypothetical question propounded to them that in their respective opinions the physical and mental conditions of which appellee now complains are all subjective symptoms and if real are but temporary and not permanent.

The Court instructed the jury that in the consideration of damages they might allow the same for permanent injuries and the giving of this instruction is assigned as error. It is the universal rule that in cases of this character only such damages as are reasonably certain to ensue may be considered for the purpose of allowing compensation for permanent injuries, future pain and suffering. Consequences of an injury which are merely speculative or possible are not proper to be considered in ascertaining damages.

Lauth v.

Chicago Union Traction Co., 244 Ill. 244; **Amann v. Chicago Consolidated Traction Co.**, 243 Ill. 263; **Lyons v. Chicago City Ry. Co.**, 258 Ill. 75. The resulting injuries which plaintiff now claims to suffer are headaches, dizziness, sleeplessness and inability to walk on account of the dizziness. These are all subjective symptoms. She received her injuries November 3, 1930. The trial was had March 11, 1931, thus a little over four months had elapsed at the time of the trial from the time she received the injuries. Counsel for appellee cite the case of **North Chicago Street Ry. v. Shreve**, 171 Ill. 438 in support of their contention that the instruction was proper under the evidence as it appears in this case. In that case it appears that three years had elapsed after the injury before the case was tried and the plaintiff in that case testified that as a result of the injury she had a miscarriage and her condition was critical, her misery was so intense that she was kept under opiates; that since that time she had been almost a total wreck and had had pains in her womb and ovaries most all the time, is very nervous and is seldom or never without a headache. The Court in that case held that the symptoms having continued for a period of three years was evidence that they were permanent and sustained an instruction allowing damages for permanent injuries. In the case at bar all the physical

injuries appellee had received had completely healed and according to the testimony of the doctors could not cause any pain or suffering. In our opinion the evidence does not show with reasonable certainty that she will suffer any permanent injuries from the accident and for this reason the instruction permitting the jury to assess damages for the same was erroneous. Counsel for appellant also claim that the Court erred in admitting two photographs of the automobile in which appellee was riding in the condition it was after the injury occurred. We have examined these photographs and they simply show that on the right side the front fender was bent and the running board more or less broken and on the left side the rear fender was bent and the running board practically broken off. We do not see how these photographs could have influenced the jury in estimating the damages for the injury to appellant. If it was error to admit them, it was harmless.

For the error in giving the instruction referred to, the judgment is reversed and cause remanded.

Reversed and Remanded.

Abstract.
Opinion filed February 15, 1932.

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265 I.A. 618¹

October Term, 1931

General No. 8544

Agenda No. 52

C. A. CALLAN, Defendant in Error,

vs.

WM. C. HIBERLY, Plaintiff in Error.

Writ of Error to City Court of the City of Pana.

NIEHAUS, P. J.

In this case a writ of error is prosecuted from a Judgment for \$342.50 rendered against the Plaintiff in Error, William C. Hiberly, in the City Court of Pana. A Jury was waived by the parties; and there was a trial by the Court.

The only errors argued in the briefs filed by the Plaintiff in Error are, that the findings of the Court are manifestly against the weight of the evidence; and that improper and incompetent evidence was admitted and considered by the Court in the trial of the case. Inasmuch as the Bill of Exceptions has been stricken from the record, the errors referred to are not open for consideration in review of the cause in this Court. *Miller v. Houke*, 1 Seam. 501; *Weinberg v. Dean*, 152 Ill. App. 122; *Weber v. Sneeringer*, 247 Ill. App. 294; *Miller v. Glass*, 118 Ill. 443. All Errors assigned and not argued are waived. *Barr v. Livingston*, 251 Ill. 330. *Murgie v. Ft. Dearborn Casualty Underwriters*, 245 Ill. App. 361; *Roberts v. Minier*, 240 Ill. App. 518. *Pearce v. Miller*, 201 Ill. 188.

And for the reasons stated, under settled practice in the State, the judgment of the trial court must be affirmed.

Judgment affirmed.

STATE OF ILLINOIS.

APPELLATE COURT

FOURTH DISTRICT.

OCTOBER TERM, A.D. 1931.

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RECEIVED
CLERK OF THE APPELLATE COURT
FOURTH DISTRICT OF ILLINOIS

TERM NO. 2.

AG. NO. 16.

265 I.A. 618²

HENRY NICKLAS, Jr.,	:	
Plaintiff in Error,	:	ERROR TO
	:	
V.	:	ST. CLAIR
	:	
J. O. McCORMICK, et al.,	:	CIRCUIT COURT.
Defendants in Error.	:	

BARRY, P. J. - Plaintiff in error averred, in his declaration, that he was a member of Belleville Musical Union, #29 of the American Federation of Musicians; that on May 6, 1927, he was regularly employed as a musician in a certain orchestra; that on said day defendants in error conspired to wrongfully injure him and destroy his good name in his employment, to cause him to be discharged from his position, and to make it impossible for him to get other employment as a musician, by wrongfully expelling him from the Union and depriving him of his membership without which he would be unable to secure employment because of an agreement between theater bands and orchestras in the city of Belleville to the effect that they would not employ anyone not a member of the Union; that through the conspiracy aforesaid, he was illegally expelled without notice or hearing or notice of any charges having been preferred against him; that by reason of the acts of the defendants he was discharged from his employment and sustained damages to the amount of \$15,000.00. At the close of his evidence the Court directed a verdict in favor of defendants in error.

The Trial Board of the Union consisted of nine members, seven of whom were sued. During the trial plaintiff in error dis-

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Each of these was found, during the trial, to be a copy of the same document, and the original was found in the possession of the defendant.

missed the suit as to four of the defendants. He acted as his own lawyer and called the three remaining defendants as witnesses in his behalf. Defendant Walter Hurst testified that he was chairman of the Trial Board and did not vote; that he was an active member, as president, as far as his office would allow; that other than being present at the meetings of the Board and presiding he had nothing whatever to do with the matter; that he did not make any talk to the members of the Board or make any motion that resulted in expulsion.

Defendant McCormick testified that he was secretary of the Trial Board; that he was an active member of the Board and took action on the resolution for expulsion, but took no part in the discussion before the Board; that he made no talk to the members about plaintiff in error; that he did not make or second any motion. While he says he took act on on the resolution, he was not asked whether he voted for expulsion.

Defendant Hammel testified that he took an active part in the case but did not act in concert with the other members of the Board in expelling plaintiff in error. He was not asked whether he voted for expulsion. No evidence was offered tending to prove a conspiracy and the Court did not err in directing a verdict. The judgment is affirmed.

Not to be reported in full **AFFIRMED.**

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NOTES BY ROY
CLERK OF THE SUPREME COURT
FOURTH DISTRICT OF ILLINOIS

AG. NO. 28.

APPEAL FROM

:
: MADISON COUNTY

COURT.

265 I.A. 618³

BARRY, P. J. - Appellees occupied a store building under a lease which expired, by its terms, on May 1, 1929. The lease contained a provision that in case the premises were sold appellees would vacate within a year upon written notice. The rent was \$93.75 per month, in advance. The premises were sold and conveyed to C.A. Caldwell on December 21, 1926, and the purchaser made written demand for possession. He leased the property to appellants on January 20, 1927, for ten years. The rent was paid by appellees until June 1, 1927, They remained in possession of the property until ^{after} December 1, 1927, but paid no rent for that period. Appellant sued to recover seven months rent, \$656.25, and there was a verdict and judgment in favor of appellees.

Appellees defense was that appellants sued them in forcible entry and detainer to recover possession of the premises and that appellants recovered a judgment which was reversed by this Court in 254 App. 60; that while said suit was pending appellants caused a distress warrant to be levied upon appellees' stock of goods and by reason thereof appellees were greatly damaged. The fact that appellants were not successful in the forcible entry and detainer suit afforded appellees no defense to this suit for rent. No actual levy of the distress warrant was made. No property was taken from the possession of appellees as they promptly gave a forth-coming bond. There was nothing more than

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U.S. DISTRICT COURT
SOUTHERD DISTRICT OF NEW YORK

IN SENATE

COMMITTEE ON

EDUCATION

CONFIRMATION OF APPOINTMENT

2

THE SENATE

U. S. DEPT. OF AGRICULTURE
APPEALS

APPEAL NO. 1

APPEAL NO. 2

COURT

HOISING - BUCKING CO. INC., et al.
Appellants.

2651A.618

HARRY, P. L. - Appellants occupied a state building until a lease with
expired, by its terms, on May 1, 1934. The lease contained a pro-
vision that in case the premises were sold appellants would receive a 10%
in a year upon written notice. The sale was made on May 1, 1934, in ac-
quence. The premises were sold and conveyed to G. L. Howell on May 1,
1934, and the purchase price was \$100,000.00. Appellants claimed that
the sale was made by appellants on January 1, 1934, and claimed to
possession of the property on January 1, 1934, but that no part of
the purchase price was paid to appellants until after May 1, 1934,
and there was a verdict and judgment in favor of appellants.

Appellants between the first appellants and the second
entry and defendant to recover possession of the premises and that appellants
recovered a judgment which was reversed by this Court on May 1, 1934.
that appellants also were entitled to a 10% interest on the purchase price
to be paid upon appellants' sale of goods and for the balance of the
appellants were entitled to receive. The Court of Appeals in its decision
expressed in the foregoing entry was entitled to a 10% interest on the purchase
no defense to this suit was shown. An appeal was taken from the decision of the
court was made. An appeal was taken from the decision of the court
as they possibly have a right to receive the same.

a paper levy. The alleged levy was made on or about November 20, 1927. Several weeks prior to that time appellees had decided to deliver possession of the leased premises by January 1, 1928, and they had been conducting a removal sale, at reduced prices, since October 15, 1927. After the alleged levy appellees further reduced their prices and continued to conduct the sale until about December 1, 1927.

The only evidence as to the alleged damages sustained by appellees was to the effect that the total proceeds of the sale were much less than the inventory prices. There was no evidence that such alleged loss was due to the alleged levy. About a month before the alleged levy appellees had decided to have the removal sale before they would go to another location. Under the evidence in this case there could be no damages from the alleged levy and the judgment is reversed with a finding of facts and the cause is remanded with directions to the trial court to enter a judgment for \$656.25.

REVERSED AND REMANDED
WITH DIRECTIONS.

The Clerk will insert in the judgment the following:-
"The Court finds that appellees were indebted to appellants in the sum of \$656.25 and that there is no evidence tending to prove any defense thereto."

Not to be reported in full

a paper last. The alleged fact was not at all relevant to
 1927. Several weeks prior to that time appellants had decided to
 deliver possession of the house known as 1225, 1226, and
 they had been conducting a business since, since
 October 12, 1927. After the alleged fact occurred, appellants
 their prices and continued to conduct the same until about January
 1, 1928.

The only evidence as to the alleged damages sustained
 by appellants was to the effect that the total amount of the sale
 was less than the purchase price. There was no evidence that
 even alleged loss was due to the alleged fact. About a month before
 the alleged fact appellants had decided to move and transfer sale to
 have they would go to another location. That the evidence in this
 case there could be no transfer from the alleged fact and the judgment
 is reversed with a finding of facts and the order is remanded with
 directions to the trial court to enter a judgment for \$500.00.

JUDGE OF THE COURT
 IN THE COURT

The Clerk will insert in the
 judgment the following:-
 "The Court finds that appellants were
 indebted to respondents in the sum
 of \$86.25 and that there is no
 evidence tending to prove any
 defense thereto."

Not to be reported in full

STATE OF ILLINOIS.

APPELLATE COURT

FOURTH DISTRICT.

OCTOBER TERM A. D. 1931.

FILED

FEB 28 1932

TERM NO. 47.

AGENDA NO. 30.

William Schwartz,
Appellee,

vs.

Sarah A. Rebhan, Executrix of
the Estate of Edward L. Rebhan,
Appellant.

APPEAL FROM THE CIRCUIT
COURT OF ST. CLAIR COUNTY.

265 I.A. 618⁴

EDWARDS, J.:— On May 22, 1928, appellee received as part of his distributive share of his mother's estate, a note for \$1,500.00, dated May 23, 1921, due in three years, interest at 6%, executed by Edward L. Rebhan and Sarah A. Rebhan, husband and wife, to the order of Walter J. Ruodiger, Trustee, and assigned by the payee in blank; the note being secured by a mortgage executed by said Rebhans to Ruodiger, as trustee.

On June 6, 1928, appellee called at the office of Ruodiger and said he wished the loan taken up; was told to leave the certificate of title for continuance, which he did, taking a receipt therefor. He did not, however, leave the note and mortgage, and never at any time delivered them to Ruodiger.

It appears Ruodiger told the Rebhans that appellee wanted his loan paid, and arranged with them to secure a new loan to take up the old one. He then ascertained that one Louis

TERM NO. 47.

Hertel would purchase the loan about to be made; had the papers executed by the Rebhans to himself, as trustee; sold and delivered them to Hertel, who paid him \$1,300.00 therefor, which amount Ruediger converted to his own use. In his capacity as trustee, he satisfied the first mortgage of record; later, in December, 1928, paid Schwartz certain interest, without informing him that the Rebhans had executed a new loan, or that the first mortgage had been released.

Ruediger, in response to Schwartz' inquiries at different times, after the new loan had been effected, gave him false assurances that the new loan had not yet been, but was in the course of being made. In the spring of 1929 Ruediger became insolvent and afterwards absconded.

It is shown that the Rebhans, at the time the note and mortgage of the second loan were made, delivered them to Ruediger to negotiate and raise money to pay the old loan, and that they did not then, or at any time, demand the return to them of the note and mortgage of the first loan.

Edward L. Rebhan having died, his widow was appointed executrix of his will. Appellee filed a claim against the estate, based upon the \$1,300.00 note, which claim was allowed by the Probate Court of St. Clair County. The executrix appealed from the order of allowance, to the Circuit Court, where, upon a hearing, the claim was again allowed, and further appeal prosecuted to this court.

Appellant's position is stated on page 4 of her brief and argument: "Our contention is that Ruediger was the agent of appellee to collect his money; that appellee, by his conduct, treated Ruediger as his debtor, and expected the money to pay his note to come through Ruediger, and that when Ruediger received and embezzled the \$1,300.00 received for the new note and mortgage, it was the money of appellee, his principal, and not the money of the Rebhans, who executed

TERM NO. 47.

the note and mortgage." Following which, appellant argues that Ruediger was the agent of appellee, in the collection of the note. No other proposition is raised or argued, hence the determination of such question decides the case.

Did appellee constitute Ruediger his agent in the transaction? Whether such agency existed was a question of fact, and appellee having asserted such as an affirmative defense, assumed the burden of its proof. *Skakel v. Hennessey*, 57 Ill. App., 332. *Chesley v. Woods Motor Vehicle Co.*, 147 Ill. App. 588.

Ruediger had been acquainted with, and a visitor at the Rebhan home for fifteen years or more; had negotiated the first loan; had collected from them the interest on such loan as it accrued; for at least a portion of the time, and turned same over to the holder of the note, while appellee, previous to acquiring the note in question, never had any dealings with Ruediger.

Mrs. Rebhan, appellant, testified that when the second note and mortgage were executed, she turned them over to Ruediger for the purpose of selling, and raising money to pay the old loan. Ruediger stated that the papers were delivered to him to dispose of for the purpose of getting money to pay appellee.

It thus appears that the Rebhans and Ruediger considered the latter was acting as agent for the former, in the selling of the new loan, and the proceeds of same, when negotiated, belonged to the Rebhans, and not to appellee.

It is evident that appellee looked upon Ruediger as the representative of the Rebhans, in the making of the second loan. He had been told by Ruediger that his clients, meaning the Rebhans, would have to make a new loan, after which appellee would be paid. He retained the custody of his note and mortgage, informed Ruediger he would not surrender same

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TERM NO. 47.

until he received his money, did not entrust them to Ruediger, as would be natural if the latter was his agent. There is no evidence which warrants the inference that appellee constituted Ruediger his agent, or regarded him as such.

Appellant, by asserting that the relation of principal and agent existed between Ruediger and appellee, assumed the burden of proving such fact. The evidence, instead of so proving, establishes the contrary, namely, that Ruediger was the representative of the Rebhans in the making and negotiating of the new loan; hence the funds derived therefrom belonged to the latter, and not to appellee.

No other question was raised upon this record, and we are of the opinion that the Circuit Court rightly decided the issue, and properly allowed the claim.

The judgment will be affirmed.

Judgment affirmed.

Not to be reported in full.



